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No. (1)

IN THE
Supreme Court of the United States

JIMMIE URBANO LUCERO,
PETITIONER,

v.

THE STATE OF TEXAS,
RESPONDENT.

On Petition for a Writ of Certiorari to
the Texas Court of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Are a defendant's Sixth Amendment rights violated where (i) the jury secretly brings a Bible into the jury deliberation room for assistance in deciding on a verdict in a capital case; and (ii) the jury foreman reads passages of the Bible in an attempt to persuade hold-out jurors to impose a sentence of death?

2. Did the Texas Court of Criminal Appeals err in relying on after-the-fact affidavits of jurors about the effect of the Bible on their deliberations as the basis for finding introduction of the Bible into the jury room to be "harmless error?"

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jimmie Urbano Lucero ("Petitioner" or "Mr. Lucero") respectfully requests this Court to issue a writ of certiorari to review the decision of the Texas Court of Criminal Appeals in this matter.

OPINIONS BELOW

On August 2, 2005, the 251st Judicial District Court for Potter County, Texas, denied Mr. Lucero's Motion for New Trial, in which he argued that his constitutional rights were violated when the jury in his capital trial took a Bible into the jury room and read certain scripture passages from that Bible before sentencing him to die. The trial court reasoned that the evidence of misconduct that Mr. Lucero submitted was inadmissible under Texas evidentiary rules and therefore could not support a motion for a new trial. Petitioner's Appendix ("Pet. App.") 40a-43a.

On February 13, 2008, on direct appeal, the Texas Court of Criminal Appeals issued an opinion affirming Mr. Lucero's conviction. The appellate court did not reach the merits of Mr. Lucero's claim that the jury's introduction of the Bible to the jury room and consideration of Bible passages violated his rights under the Sixth and Eighth Amendments. Instead, the Court of Criminal Appeals concluded that the presence of the Bible and its reading was "harmless error" because post-trial affidavits from the jurors stated that their decision was not affected by the reading of the Bible and that Mr. Lucero

received a fair trial. The Texas Court of Criminal Appeals' opinion is reported at 246 S.W.3d 86 (Tex. Crim. App. 2008), and is reprinted at pages 1a-39a of Petitioner's Appendix to this Petition.

JURISDICTION

The Texas Criminal Court of Appeals issued its decision on February 13, 2008. Pet. App. 39a. That decision became final on February 28, 2008. Tex. R. Civ. P. 79.1 (creating time limits for requests for panel rehearing). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth and Fourteenth Amendments to the United States Constitution, which are reprinted at Pet. App. 121a-122a.

STATEMENT OF THE CASE

On May 26, 2005, Mr. Lucero was sentenced by the 251st District Court, Potter County, Texas, to die by lethal injection for the murders of Maria Fabiana Robledo, Maria Manuela Robledo, and Pedro Robledo on September 6, 2003. The court's sentence followed less than five hours of deliberations by the jury in the penalty phase of his capital trial. Pet. App. 2a, 19a n.9.

A. Mr. Lucero's Sixth Amendment Rights Were Violated When The Jury Foreman Took A Bible Into The Jury Room And Read Passages From That Bible To Coerce Two Jurors Into Sentencing Mr. Lucero To Death.

After the jury's verdict in the penalty phase, Mr. Lucero's appellate counsel, who happened to be following the trial proceedings, interviewed several members of the jury. Pet. App. 61a. One of the jurors informed Mr. Lucero's counsel that during deliberations in the punishment phase of the trial, the jury foreman, apparently unbeknownst to the trial court, brought a Bible into the jury room and read scripture to the other members of the jury relating to "a Christian's duty to obey, conform and consent to the will and laws of man." Pet. App. 47a.

The juror also stated that the foreman read the scripture immediately after the foreman held a "straw vote" that revealed that two of the jurors were in favor of sentencing Mr. Lucero to life in prison rather than death. After listening to the Bible reading, however, those two jurors changed their minds and voted to sentence Mr. Lucero to death.

The juror signed an affidavit attesting to the foregoing facts, and others, on June 23, 2005. The affidavit states:

I served as juror in the case styled The *State of Texas v. Jimmie Urban* [Urbano] *Lucero* in the 251st District Court in Potter County, Texas. During jury deliberations at the punishment phase of the trial, I recall that the jury foreman suggested that we take a "straw vote" or a preliminary vote on the two special issues to see where we, as the jury[,] were.

[¶] The initial vote on both special issues showed 10 jurors were in favor of answering the questions in a way in which the death penalty would be imposed. The remaining two jurors were unwilling to answer those questions in a way in which the death penalty would be imposed. It was a[t] this point in time that the jury foreman took out a Bible which he had with him.

[¶] He read some scripture from the Bible. This scripture had to do with a Christian's duty to obey, conform and consent to the will and laws of man. This reading of scripture occurred before the final votes were taken by the jury on the two special issues regarding the probability that the Defendant would commit criminal acts of violence in the future and the sufficiency of mitigating evidence which would justify

> a life sentence in place of the death penalty.
>
> [¶] Although there was not a unanimous vote by the jury as a whole on the two issues before the reading of the scripture, the vote was unanimous on both special issues some time after the reading of scripture. The foreman of the jury then informed the bailiff and the Court that we had reached a unanimous verdict which called for the death penalty against Jimmie Lucero.

Pet App. 47a-48a.

The State of Texas later obtained sworn affidavits from all twelve jurors, who confirmed Mr. Lucero's evidence that:

- The jury foreman read scripture from the Bible to members of the jury during sentencing deliberations;

- The foreman read the scripture at a time when deliberations were ongoing and two jurors were not in favor of sentencing Mr. Lucero to death; and,

- The jury did not reach a unanimous decision to sentence Mr. Lucero to death until after the scripture was read.

Pet. App. 9a-12a, 99a-100a.

Based on the affidavits, at least one of the Bible passages read to the jury was the New International Version of Romans 13:1-6, which states:

> Submission to the Authorities
>
> 1 Everyone must submit himself to the governing authorities, for there is no authority except that which God has established. The authorities that exist have been established by God. 2 Consequently, he who rebels against the authority is rebelling against what God has instituted, and those who do so will bring judgment on themselves. 3 For rulers hold no terror for those who do right, but for those who do wrong. Do you want to be free from fear of the one in authority? Then do what is right and he will commend you. 4 For he is God's servant to do you good. But if you do wrong, be afraid, for he does not bear the sword for nothing. He is God's servant, an agent of wrath to bring punishment on the wrongdoer. 5 Therefore, it is necessary to submit to

> the authorities, not only because of possible punishment but also because of conscience. 6 This is also why you pay taxes, for the authorities are God's servants, who give their full time to governing.

Pet. App. 99a-100a.

B. The Trial Court Denies Mr. Lucero's Motion For New Trial.

On June 23, 2005, Mr. Lucero filed a Motion for New Trial in the trial court on the basis of the juror affidavit that he obtained. Mr. Lucero requested an evidentiary hearing to adduce all of the facts relating to the introduction of the Bible to the jury room, and to determine the extent of the Bible's influence on the jury deliberation process. Mr. Lucero argued that the foreman's reading of the Bible to the jury "infringed on each individual juror's duty to base their verdict only on evidence received at trial," and thus was "detrimental to Defendant's constitutional guarantee that the verdict at the punishment phase of the trial be truly unanimous, free from coercion and the product of the juror's individualized assessment of evidence lawfully admitted into [sic] during the punishment phase of the trial." Pet. App. 45a. Mr. Lucero asked the trial court to hold an evidentiary hearing on the jury's consideration of the Bible, and ultimately to order a new trial. *Id.* 46a.[1]

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[1] Mr. Lucero filed an Amended Motion for New Trial on June 27, 2005, in which he added a claim under *Tennard v. Dretke*,

On June 30, 2005, the trial court questioned the admissibility of the juror affidavit, and thus whether it could support a motion for a new trial. The court expressed its view that Rule 606(b) of the Texas Rules of Evidence limits juror testimony to two specific situations: "(1) whether any outside influence was improperly brought to bear upon a juror; and (2) to rebut a claim that the juror was not qualified to serve." The trial court deferred ruling on Mr. Lucero's motion, and instead asked the parties to submit briefs addressing the admissibility of the juror affidavit. Pet. App. 49a-51a.

Mr. Lucero filed his initial brief on July 14, 2005. Pet. App. 52a-63a. Mr. Lucero argued that the juror affidavit was admissible, and therefore was a sufficient basis for a motion for new trial, because the Bible was an improper "outside influence" under Rule 606(b) of the Texas Rules of Evidence. Mr. Lucero directed the court to several cases from other jurisdictions in which the courts set aside the defendant's death sentence and ordered new trials based on the jury's consideration of the Bible during deliberations, including one case in which the court held that the jury's consideration of the Bible violated the defendant's constitutional rights. *Id.* 56a-57a.

In its response to the trial court, the State of Texas argued that the Bible is not an "outside

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542 U.S. 274 (2004). Pet. App. 117a-120a. That claim is immaterial to this Petition.

influence." Pet. App. 71a-80a, 82a-83a. The State also argued that any error that was caused by the jury's consideration of the Bible was harmless. *Id.* 83a-85a.

In support of the latter argument, the State submitted affidavits from all twelve members of Mr. Lucero's jury, which, as noted above, confirmed all of the material facts relating to the foreman's reading of the Bible to the jury. The State argued, however, that any constitutional error caused by the foreman's reading of the Bible was harmless. All of the affidavits submitted by the State contained boilerplate statements that the foreman's reading of the Bible did not cause any jurors to change their vote, that Mr. Lucero received a fair and impartial trial, and that the reading of the scripture did not violate any of Mr. Lucero's rights. *See, e.g.*, Pet. App. 9a, 12a, 14a, 101a.

The trial court denied Mr. Lucero's Motion for New Trial on August 2, 2005. The trial court did not address the merits. Instead, the trial court denied the motion due to "public policy" concerns:

> While I recognize that "sometimes trial courts choose to *wisely* make a full record of factual matters in death penalty cases", [sic] I believe that such action is contrary to the public policy being promoted by Rule 606(b) of the Texas Rules of Evidence, in that it would subject the jurors to the rigors of direct and cross examination regarding

> their deliberations. Such public scrutiny of confidential deliberations would discourage open discussion among jurors and could potentially be threatening to the entire jury process.
>
> To conduct a hearing simply to make a record, without any expectation that the hearing would result in admissible evidence, does not protect jurors from the inconvenience and potential harassment that such a hearing would impose. Therefore, under the present circumstances, I do not believe that the defendant has raised an issue which would require an evidentiary hearing.

Pet. App. 42a (emphasis in original).

C. Mr. Lucero's Direct Appeal Is Denied.

Mr. Lucero filed a notice of appeal to the Texas Court of Criminal Appeals on August 12, 2005. Pet. App. 115a. Mr. Lucero asserted seven points of error from the trial court, including two that arose from the jury foreman's reading of the Bible to the jury:

> 1. The trial court abused its discretion in denying Mr. Lucero's request for an evidentiary hearing on the jury's consideration of the Bible; and,

2. The foreman's reading of the Bible violated Mr. Lucero's rights as guaranteed by the Sixth, Eighth, and Fourteenth Amendments.

Pet. App. 2a & n.2, n.3.

In its response brief, the State of Texas reasserted its argument that the juror affidavit that Mr. Lucero submitted to the trial court was inadmissible under Texas Rule of Evidence 606(b), and further argued that the juror affidavits it had obtained proved that any constitutional error was harmless. Additionally, the State argued that Mr. Lucero had waived any constitutional claim, and that the jury's consideration of the Bible in sentencing Mr. Lucero to death did not violate his constitutional rights. Pet. App. 18a-19a.

On February 13, 2008, the Texas Court of Criminal Appeals rejected all of Mr. Lucero's claims, including his Sixth Amendment claim, and otherwise affirmed his conviction and sentence. Pet. App. 19a-20a, 39a.

The appellate court found that it was "unnecessary to decide whether the jury foreman's Bible reading in this case was an 'outside influence,' because this record presents no 'reasonable grounds' that this Bible reading affected the jury's verdict." Pet. App. 19a.

The appellate court based its decision on the juror affidavits that the State submitted to the trial court. Pet. App. 9a-16a, 19a. The court found that the twelve "affidavits clearly indicate that the scripture had no effect on the jury's verdict rendered some hours later," and thus the court could not "conclude that the trial court abused its discretion in declining to hold a hearing on appellant's new trial motions." Pet. App. 19a-20a. The court further concluded that "any constitutional error that appellant may have preserved as a result of this Bible reading was harmless beyond a reasonable doubt." *Id.* 20a. The court also suggested that the jury's consideration of the Bible did not violate the Sixth Amendment or Eighth Amendment in any event. *Id.* 20a n.10. The appellate court did not address, and did not rest its decision on, any consideration of Texas evidentiary law or waiver.

REASONS FOR GRANTING THE WRIT

The Court should review the decision below for two reasons.

First, this Court should resolve a split among the circuits over whether the Bible is extrinsic evidence and/or an "outside influence" that may not be brought into the jury room for assistance in reaching a verdict under the Sixth Amendment. The First and Eleventh Circuits have applied the long-standing precedents of this Court to correctly determine that the introduction of the Bible to the jury room for use in deliberations violates the right to an impartial jury, the right of confrontation, and

the right to a fair trial as guaranteed by the Sixth and Fourteenth Amendments. The Fourth and Ninth Circuits, however, have determined that the introduction of the Bible – or at least specific verses of the Bible – to jury deliberations does not violate the Sixth Amendment because the Bible's content is a matter of "common knowledge" or a "cultural precept."

This case provides an excellent opportunity for the Court to resolve the split by reaffirming its long-standing precedents that the Sixth Amendment guarantees that jury verdicts in criminal cases will be based on the evidence developed at trial, and nothing else. In doing so, it will save the courts from making the sort of *ad hoc* factual determinations that the decisions of the Fourth and Ninth Circuits require.

Second, the Court should clarify that federal law does not allow courts to consider juror affidavits about the deliberative process in determining whether a constitutional error is harmless. This case is particularly compelling on this issue because the lower court denied Mr. Lucero's Sixth Amendment claim on the basis of juror affidavits even though the trial court denied Mr. Lucero an evidentiary hearing to test the veracity of those affidavits.

I. The Court Should Resolve A Split Among The Circuits Over Whether The Sixth Amendment Prohibits Jurors From Bringing The Bible Into The Jury Room For Use In Deliberations.

This Court has long held that the Sixth Amendment guarantees that a jury's verdict will be based solely on the evidence developed at trial, and be free from any and all "extraneous influences." Despite the clarity of the Court's decisions, however, the circuit courts are split over whether the Bible is an external influence that the Sixth Amendment prohibits.

In the decision below, the Texas Court of Criminal Appeals denied Mr. Lucero's claim that his Sixth Amendment rights were violated when the jury foreman brought a Bible into the jury room and used it to coerce two jurors into voting for the death penalty. Although the court below found it "unnecessary" to reach the merits of Mr. Lucero's claim, it cited with approval a decision from the Ninth Circuit, which stated that a defendant's Sixth Amendment rights are not violated where a juror reads passages from the Bible that are matters of "common knowledge" or "notions of general currency." *Fields v. Brown*, 503 F.3d 755, 779-80 (9th Cir. 2007). The Fourth Circuit has reached the same result, albeit for a different reason. It has held that the Bible is an "internal influence," not an "external influence," and thus not prohibited by the Sixth Amendment. *Robinson v. Polk*, 438 F.3d 350, 361-66 (4th Cir. 2006).

On the other hand, the First and Eleventh Circuits have stated that the Sixth Amendment prohibits the introduction of the Bible to the jury room for use in deliberations. *See United States v. Lama-Ramirez*, 519 F.3d 76, 89 (1st Cir. 2008); *McNair v. Campbell*, 416 F.3d 1291, 1307-08 (11th Cir. 2005).

As demonstrated below, the only rule that can be squared with this Court's Sixth Amendment jurisprudence, and that is capable of being applied on a consistent basis, is one that treats the Bible as an external influence that may not be consulted by the jury.

A. This Court Has Consistently Held That The Sixth Amendment Prohibits A Jury From Bringing Any And All Outside Materials Into The Jury Room For Use In Deliberations.

The Sixth Amendment guarantees two fundamental rights relevant to this case. The fundamental rights guaranteed by the Sixth Amendment apply both to the guilt and punishment phases of trial. *Morgan v. Illinois*, 504 U.S. 719, 727-28 (1992).

First, the Sixth Amendment guarantees the accused the right to a trial before an "impartial jury." U.S. Const. amend. VI. That right "guarantees . . . a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). As this Court stated over a century ago, "[i]t is vital in

capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment." *Mattox v. United States*, 146 U.S. 140, 149 (1892).

Second, the Sixth Amendment guarantees the accused the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. The Confrontation Clause requires, among other things, a jury's verdict to be "based on the evidence developed at trial." *Irvin*, 366 U.S. at 723. It also "necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965). Extrinsic information or influences upon the jury's deliberations are presumptively prejudicial. *Remmer v. United States*, 347 U.S. 227, 229 (1954).

This Court has recognized at least three times that the contamination of a jury's deliberations with an extraneous influence violates the Sixth Amendment. In *Parker v. Gladden*, 385 U.S. 363, 364 (1966), the Court found that statements made by a bailiff to the jury were "outside influence[s]" that violated the defendant's right to an impartial jury. Similarly, in *Turner*, 379 U.S. at 468, the Court held that a capital defendant was denied his right to an impartial jury where two deputy sheriffs, who gave testimony leading to the defendant's conviction, "freely mingled and conversed with jurors." Also, in *Remmer*, 347 U.S. at 228-29, the Court held that

"[t]he integrity of the jury proceedings" was "jeopardized by [an] unauthorized invasion[]" where an unnamed person remarked to a juror that "he could profit by bringing a verdict favorable to the petitioner."

In addition, although the Court did not directly apply the Sixth Amendment in *Mattox*, the Court stated that the trial court erred by failing to consider affidavits stating that a newspaper and other extraneous influences were introduced to the jury room. *Mattox*, 146 U.S. at 150-51.

The foregoing decisions of this Court stand for the proposition that a jury's verdict must be based on the evidence developed at trial, the court's instructions, and nothing else.

Applying that unequivocal rule to this case, Mr. Lucero's Sixth Amendment rights were violated when the jury foreman secretly brought the Bible into the jury room and read the Bible aloud to the rest of the jury – including two jurors who voted against the death penalty in a preliminary vote – to persuade those jurors to change their votes. Pet. App. 47a-48a. Under *Remmer*, 347 U.S. at 229, the jury's consideration of the Bible was presumptively prejudicial to Mr. Lucero.

This Court should conclude that the Bible's presence in the jury room and use during deliberations violated Mr. Lucero's rights as an "extraneous influence" without even considering the particular passage that was read. But when one

considers the particular passage read in this case – Romans 13:1-6 – it illustrates the substantial prejudice visited upon Mr. Lucero.

The first verse of Romans 13, which is quoted *supra* at pages 6-7, instructs man to "submit himself to the governing authorities, for there is no authority except that which God has established." Moreover, the fourth verse makes clear that the "governing authorities" to which Romans 13:1 speaks are those who are charged with enforcing the law. Thus, in the context of a criminal trial such as Mr. Lucero's, the "governing authorities" are the prosecutors, as they are in charge of enforcing the laws of the State. One state's highest court has interpreted Romans 13 in exactly this manner. *People v. Harlan*, 109 P.3d 616, 631 (Colo. 2005) ("The Romans text instructs human beings to obey the civil government. Here, the State of Colorado was seeking the death penalty.").

Furthermore, the second verse of Romans 13 warns that "he who rebels against authority is rebelling against what God has instituted, and those who do so will bring judgment on themselves." Again, the foreman's reading of that passage effectively instructed the jurors in Mr. Lucero's case that if they did not comply with the prosecutors' request for the death penalty, they would be punished by God.

Thus, the biblical verses that the foreman read aloud effectively instructed the jurors to ignore the evidence that was presented at trial and the court's instructions, and instead submit to the State's

authorities. The prejudicial effect of the reading was compounded by the timing of the reading – *i.e.*, at a time when at least two of the jurors were opposed to sentencing Mr. Lucero to death.

B. The First And Eleventh Circuits Have Stated That The Bible Is An Extraneous Material That May Not Be Introduced Into Jury Deliberations.

Consistent with this Court's decisions in *Turner*, *Parker*, and *Remmer*, the majority of courts that have considered whether an accused's Sixth Amendment rights are violated by the jury's use of the Bible in deliberations, including the First and Eleventh Circuits, have answered that question in the affirmative. In doing so, they have treated the Bible like any other extraneous influence, which is flatly prohibited from consideration by the jury under this Court's precedents.

In *McNair v. Campbell*, 416 F.3d 1291 (11th Cir. 2005), the defendant was convicted of capital murder in Alabama state court. The undisputed evidence showed that the jury foreman brought a Bible into the jury room and read aloud from it during deliberations. *McNair*, 416 F.3d at 1301. In his federal habeas petition, the defendant asserted that the Bible was "extraneous evidence" and that the jurors' consideration of it during deliberations deprived him of his right to a fair trial under the Sixth Amendment. *Id.* at 1301-02.

Applying this Court's decisions in *Turner* and *Remmer*, the Eleventh Circuit determined that the Bible is like any other evidence that does not "come from the witness stand" – it is "extrinsic evidence" that the jury may not consider under the Sixth Amendment. *Id.* at 1307-08. The court also held that the constitutional violation that occurred when the jury considered the Bible during deliberations was "presumptively prejudicial." *Id.* at 1307 (citing *Turner*, 379 U.S. at 473). The court ultimately found that the state satisfied its heavy burden of rebutting the presumption of prejudice and found that the error was harmless. *Id.* at 1308-09. But the Eleventh Circuit's ruling on the merits of the defendant's claim was clear: the introduction of the Bible to jury deliberations was a violation of the defendant's Sixth Amendment rights.

The First Circuit reached a similar conclusion in *United States v. Lara-Ramirez*, 519 F.3d 76 (1st Cir. 2008). In that case, the district court declared a mistrial when it learned that a juror brought the Bible into the jury room and that the Bible was used in deliberations. *Lara-Ramirez*, 519 F.3d at 80-81. The defendant moved to dismiss his new indictment on the basis of double jeopardy, arguing that the trial court did not consider alternatives to a mistrial during the initial trial. The district court denied the defendant's motion to dismiss, and the defendant was retried and convicted. *Id.* at 81-82. On appeal to the First Circuit, the defendant argued that his conviction violated the Double Jeopardy Clause. *Id.* at 82.

In determining whether the district court adequately explored alternatives to a mistrial, the First Circuit found that the district court erred by "treat[ing] the Bible in the jury room as qualitatively different from other types of extraneous materials or information that may taint a jury's deliberations." *Id.* at 88; *see also id.* at 89 (finding that "no special rule exists when the Bible is involved"). That finding is consistent with this Court's Sixth Amendment jurisprudence and the Eleventh Circuit's decision in *McNair*, which do not distinguish between the type or nature of extrinsic evidence in determining whether it violates an accused's rights under the Sixth Amendment. If the evidence is outside the record, a constitutional violation has occurred.

In addition, several other courts have vacated jury verdicts based on the introduction of the Bible to jury deliberations, or otherwise suggested that the use of the Bible would be error. For instance, in *People v. Harlan*, 109 P.3d 616 (Colo. 2005), the Colorado Supreme Court affirmed the vacation of a death sentence where the trial court found that jurors "introduced one or more Bibles, a Bible index, and notes of Bible passages into the jury room for consideration by other jurors." *Id.* at 629. The court reasoned that since the Bibles had not been admitted into evidence, they "were extraneous and their introduction was improper and constituted misconduct." *Id.*

The court then examined "how the extraneous information related to critical issues in the case," that is, the propriety of the death sentence, "the

degree of authority represented by the extraneous information," how the information was acquired, whether it was shared, whether the information was considered prior to the jury reaching a verdict, and whether there was a reasonable possibility that the biblical passages would influence a typical juror to the defendant's detriment. *Id.* at 630-31.

Noting that the Bible contains codes of laws and morality, *id.* at 630, the Colorado Supreme Court concluded that the Bible verses, including Romans 13, "created a reasonable possibility that a typical juror would have been influenced to vote for a death sentence instead of life." *Id.* at 631. The court consequently affirmed the vacation of the jury's death sentence. *Id.* at 634.

Other state courts have strongly suggested that consideration of the Bible is an improper extraneous influence. *See, e.g.*, *People v. Williams*, 148 P.3d 47, 79 (Cal. 2006) ("[R]eading aloud from the Bible or circulating biblical passages during deliberations is misconduct."), *cert. denied*, 128 S. Ct. 179 (2007); *Glossip v. State*, 29 P.3d 597, 604-05 (Okla. Crim. App. 2001) ("Any outside reference material, including but not limited to Bibles or other religious documents . . . should not be taken into or utilized during jury deliberations."); *State v. Kelly*, 502 S.E.2d 99, 103-04 (S.C. 1998) (finding it "improper" for a juror to possess the pamphlet "God, Law, and Capital Punishment" even during guilt deliberations); *Jones v. Francis*, 312 S.E.2d 300, 303 (Ga. 1984) (stating that a court erred by permitting a Bible into jury deliberations); *State v. Harrington*,

627 S.W.2d 345, 350 (Tenn. 1981) (stating that reading "biblical passages" in deliberations "of course, was error which would have required a new sentencing hearing" even absent other errors).

C. The Fourth And Ninth Circuits Have Incorrectly Interpreted This Court's Sixth Amendment Precedents.

In this case, however, the Texas Court of Criminal Appeals erred by siding with the reasoning of the Fourth and Ninth Circuits, which have held that it is constitutionally permissible for jurors to consider the Bible in their deliberations in certain fact-specific circumstances. *Fields v. Brown*, 503 F.3d 755 (9th Cir. 2007); *Robinson v. Polk*, 438 F.3d 350 (4th Cir. 2006). Those cases depart from this Court's clear precedents that require juries to base their verdicts on the evidence developed at trial and essentially permit a free-for-all for jury deliberations in future capital cases.

In *Fields*, 503 F.3d at 777-78, on the evening after deliberations began in the penalty phase of the defendant's trial, the jury foreman consulted the Bible and created a list of verses that are "for" the imposition of the death penalty, and a list of verses that are "against" it, and shared his notes with some of the jurors the following day. Shortly thereafter, the jury reached a unanimous decision to impose the death penalty. The defendant sought habeas relief, arguing that the notes were extraneous materials forbidden from jury consideration by the Sixth Amendment. *Id.* at 777.

On appeal from the district court, the Ninth Circuit recognized the "core principle" that "evidence developed against a defendant must come from the witness stand." *Id.* at 779. However, the Ninth Circuit stated that whether a particular outside influence violates the Sixth Amendment involves a "fact-specific" inquiry that requires courts to determine whether the influence is "common knowledge." *Id.* Although it also found that any error was harmless, *id.* at 781-83, the Ninth Circuit found that the particular biblical passages that the jury considered in *Fields* were not outside influences because they were "commonly known points" or "notions of general currency that inform . . . moral judgment." *Id.* at 780.

Two judges in *Fields* dissented to address the problems with the majority's Sixth Amendment analysis. Judge Gould found that the majority's reliance on "notions of general currency that inform moral judgment" was unpersuasive and more difficult to apply than the majority believed: not *every* word in the Bible is common knowledge, and the notion of common knowledge seemed to encompass not only ethical principles from Christianity, but also ethical principles from other religions and philosophers, and "street-corner wisdom." *Id.* at 784-86 (Gould, J., dissenting in part). Judge Berzon noted that "federal and state appellate courts generally agree . . . that a jury engages in the unconstitutional consultation of extrinsic material by introducing the Bible into deliberations during a capital trial." *Id.* at 796

(Berzon, J., dissenting). He also found that the majority's notion of common knowledge "disregards the careful balance between the various precepts regarding jury deliberations" in American law. *Id.* at 796.

The Fourth Circuit in *Robinson v. Polk*, 438 F.3d 350 (4th Cir. 2006), also concluded that the Sixth Amendment does not prohibit the use of the Bible in jury deliberations. In *Robinson*, the defendant presented evidence that one of the jurors obtained a Bible from a bailiff, and read an "eye for an eye" passage to the rest of the jurors to convince them to vote for the death penalty. *Id.* at 357-58. The defendant argued in the trial court that the juror's reading of the Bible violated his Sixth Amendment rights and requested a hearing, which was denied. The defendant's claim was rejected both by a state post-conviction proceeding court, and by a federal district court in a federal habeas corpus proceeding. *Id.* at 354.

Like the Ninth Circuit, the Fourth Circuit held that the defendant's Sixth Amendment rights were not violated by the jury's consideration of the Bible, albeit by engaging in a different analysis. The Fourth Circuit held that the Sixth Amendment prohibits only "external influences" on the jury, and thus does not prohibit "influences internal to the deliberation process." *Id.* at 363.

The Fourth Circuit found the Bible to be an "internal influence" because it concluded that the Bible was not "extraneous prejudicial information."

Id. at 361 & n.13.[2] The court also concluded that the Bible was not "an outside influence upon the partiality of the jury," because "the reading of the Bible passages invites the listener to examine his or her own conscience from within." *Id.* at 363. Like the Ninth Circuit's decision in *Fields*, the Fourth Circuit also suggested that the Bible may be considered by the jury because it is a "cultural precept[]," which courts "cannot expect jurors to leave . . . at the courthouse door." *Id.* at 366 n.18.

The Fourth Circuit's opinion was met with a strong dissent arguing that the majority opinion improperly and "artificially" construed this Court's decisions in *Parker*, *Turner*, and *Remmer* establishing the Sixth Amendment's "unmistakably clear" prohibition on external influences on the jury. *Id.* at 371 (King, J., dissenting). The dissent argued that the majority's suggestion that the Bible was permissible because it "invites the listener to examine his or her own conscience from within" was both unsupported by precedent and wrong on the facts, as "the Bible is an authoritative code of morality – and even law – to a sizeable segment of our population." *Id.* at 374.[3]

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[2] The Fourth Circuit expressly noted that its decision "could possibly be different on de novo review," as opposed to AEDPA-governed habeas corpus review. *Id.* at 363.

[3] A denial of rehearing *en banc* prompted another opinion disagreeing with the majority's reasoning, stating that the deliberative use of a Bible violated the Sixth Amendment. *Robinson v. Polk*, 444 F.3d 225, 226 (4th Cir. 2006) (Wilkinson, J., concurring in denial of rehearing *en banc*) (agreeing with

The Fourth and Ninth Circuits, therefore, have split with the First and Eleventh Circuits, as well as the vast majority of state courts that have considered the issue, in determining that the Bible is not an outside influence that the Sixth Amendment prohibits.

D. The Court Should Clarify That The Sixth Amendment Prohibits The Use Of The Bible In Jury Deliberations.

As noted above, this Court's decisions in *Turner*, *Parker*, and *Remmer* created a clear rule: the Sixth Amendment requires jury verdicts to be based solely on the evidence developed at trial and nothing else. Any and all extraneous materials – whether additional evidence or outside influences – violate an accused's right to an impartial jury, the right of confrontation, and more generally, the right to a fair trial.

While the First and Eleventh Circuits have applied that rule, the Fourth and Ninth Circuits have ignored this Court's precedents and held that the Sixth Amendment allows jurors to consider extraneous materials as long as they are matters of "common knowledge," "notions of general currency," or are "cultural precepts." There are several problems with those decisions.

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majority opinion solely on grounds of AEDPA standard of review).

First, as noted, the Fourth and Ninth Circuits' creation of a permissible type of extraneous materials in jury deliberations is plainly inconsistent with this Court's long-standing prohibition against any and all extraneous materials.

Second, the Fourth and Ninth Circuits threaten to sink the federal and state courts into a morass of *ad hoc* fact-intensive decisions about what types of materials are matters of "common knowledge," "notions of general currency," or "cultural precepts." Even within the Bible itself, courts would be called upon to determine which verses are "common knowledge," and which are not. *Fields*, 503 F.3d at 784-85 (Gould, J., dissenting).

Moreover, courts would be placed in the difficult position of deciding which texts, both religious and academic, are "notions of general currency." *Fields*, 503 F.3d at 785 (Gould, J., dissenting). As Judge Gould remarked, that would be "unworkable" in practice:

> Is it solely ethical principles from the familiar Bible? Does it also include ethical principles from other religions? Does it include ethical principles from philosophers? Does it include street-corner wisdom such as might be found in popular novels of any number of current authors whose books line the supermarket shelves?

Id. at 785-86; *see also Robinson*, 444 F.3d 225, 227 (4th Cir. 2006) (Wilkinson, J., dissenting from denial of reh'g *en banc*) ("The jury room is not the place to debate the respective merits of the Bible, the Koran, the Torah, or any other religious scripture that Americans revere . . . ."). Ultimately, if courts permit juries to consider verses from the Bible, and not texts from other religions, it would "introduce[] something akin to an Establishment Clause violation into the heart of the jury room." *Fields*, 503 F.3d at 785 (Gould, J., dissenting).

The decisions of the Fourth and Ninth Circuits also would produce conflict over the use of other types of texts in jury deliberations, for example, English dictionaries, medical dictionaries, and almanacs. *See, e.g., Fields*, 503 F.3d at 783 (stating that a jury's consideration of a dictionary was error); *Gibson v. Clanon*, 633 F.2d 851, 852-53 (9th Cir. 1980) (reversing a conviction based on improper consideration of medical dictionary's statements concerning the rarity of AB blood); *Haight v. Aldridge Elec. Co.*, 575 N.E.2d 243, 253-55 (Ill. App. Ct. 1991) (ordering a new trial because of a juror's improper use of an almanac); *see also Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1241 (10th Cir. 2000) (collecting cases on the use of extrinsic materials).

A decision in this case that reaffirms the Court's decisions in *Turner*, *Parker*, and *Remmer*, as well as those of the First and Eleventh Circuits, will avoid this uncertainty and uneven applications of the

rule, both of which are particularly important to avoid in capital cases.

II. The Texas Court Of Criminal Appeals Erred By Relying On Subjective Juror Affidavits To Find That The Introduction Of The Bible To Jury Deliberations Was Harmless Error.

The Texas Court of Criminal Appeals also erred when it relied on untested subjective statements in post-trial affidavits from Mr. Lucero's jurors, who had not testified or been subjected to cross-examination, to conclude that the introduction of the Bible to the deliberations had "no effect" on the jury's decision to vote for death. Pet. App. 19a. Federal law does not permit inquiry into juror deliberations and thinking to assess the effect of a trial error, particularly a structural error, on the verdict. Moreover, even if it were proper to consider the jurors' subjective testimony of the Bible's effect on their votes (which it is not), the Texas courts still would have erred because they failed to give Mr. Lucero either an evidentiary hearing to cross-examine the jurors about their affidavits or some other means to test the veracity of the statements in the affidavits.

A. The Texas Courts Failed To Use An Objective Inquiry To Determine Whether The Bible Was Harmless.

Federal constitutional error in a trial requires reversal on direct appeal unless that error is

harmless beyond a reasonable doubt. *Fry v. Pliler*, 127 S. Ct. 2321, 2325 (2007). To determine whether an error is harmless beyond a reasonable doubt, courts must use an objective test, not a "subjective enquiry into the juror's minds"; a court inquires into "the force of the evidence presumably considered by the jury" and the objective nature of the error. *Yates v. Evatt*, 500 U.S. 391, 404-05 (1991), *overturned on other grounds*, *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). As a matter of federal law, the prejudicial effect of an error does not depend upon "the idiosyncrasies of the particular decisionmaker." *Strickland v. Washington*, 466 U.S. 668, 694-95 (1984) (finding the testimony of a sentencing judge that he would have imposed the same sentence absent defendant's ineffective assistance of counsel irrelevant to whether the defendant was prejudiced by counsel's performance).

An objective test also must be used to assess the effect of an error occurring during jury deliberations. The testimony of the jurors themselves may be used only for the limited purpose of establishing the "circumstances" of an extraneous influence on the jury (such as to establish that an external influence was brought into the jury room or that an improper contact was made). *Smith v. Phillips*, 455 U.S. 209, 216 (1982) (citing *Remmer*, 347 U.S. at 230). But juror testimony cannot be considered in determining whether the jurors would have reached the same decision absent the extraneous influence. In other words, the *effect* of the extraneous influence can only be assessed using

objective standards. *Rushen v. Spain*, 464 U.S. 114, 121 n.5 (1983). As this Court explained in *Rushen*:

> A juror may testify concerning . . . whether extraneous prejudicial information was improperly brought to the juror's attention. But a juror generally cannot testify about the mental process by which the verdict was arrived. Thus, the California Court of Appeal refused to consider certain testimony in arriving at its decision that respondent had not suffered prejudice beyond a reasonable doubt.

Id. (internal quotations and citations omitted).

For these reasons, courts have used an objective test to determine whether the improper use of a Bible in jury deliberations prejudiced a defendant. *See, e.g., Fields*, 503 F.3d at 781 n.22 ("[T]he question of prejudice from extrinsic information is an objective one, not a subjective one."); *McNair*, 416 F.3d at 1307-08 (listing "factors to be considered," none of which is a juror's private opinion of the Bible's effect). The objective nature of the test also is required by evidentiary law, which generally prohibits inquiry into the decision-making processes of the jury. *See, e.g., Virgil v. Zavaras*, 298 F.3d 935, 941 (10th Cir. 2002) (citing Fed. R. Evid. 606(b)); *Harlan*, 109 P.3d at 631 ("Neither do we hold that consideration of the [Bible] actually produced the death penalty verdict. To the contrary, [Colorado Rule of Evidence] 606(b) prevents us from

considering any juror testimony that addresses the jury's deliberations or a juror's thought process.").

In this case, the Texas Court of Criminal Appeals violated Mr. Lucero's Sixth Amendment and due process rights by relying on the subjective statements in the juror affidavits to conclude that introduction of the Bible was harmless because "[t]he affidavits clearly indicate that the scripture had no effect on the jury's verdict rendered some hours later." Pet. App. 19a. In reaching that conclusion, the lower court relied on statements in the affidavits that the jurors were not affected by the jury foreman's reading of Romans 13 in reaching their votes for death, and that they would have voted the same way absent the scripture reading. *See, e.g., id.* 14a.

Federal law prohibited the lower Texas courts from relying on the jurors' after-the-fact assurances that the Bible did not affect their thought processes. Instead, the Texas Court of Criminal Appeals should have ignored the subjective aspects of the juror affidavits and squarely examined the text that was introduced to the jury room and its likely effect on the average juror.

B. The Bible Passage Read During Deliberations, Romans 13:1-6, Was Not Harmless.

The State admits that a Bible was brought into the jury room and that at least one Bible passage, Romans 13:1-6, was read directly to jurors

in the jury room during jury deliberations at a delicate time when at least two jurors were holding out for life.

The Texas Court of Criminal Appeals found that Romans 13:1-6, which is quoted above at pages 6-7, was "essentially an admonishment to follow man's law (and, therefore, duplicated what was already in the court's charge)." Pet. App. 19a. But the Texas court's attempt to equate Romans 13:1-6 with the trial court's charge is facile. If the lower court had conducted an objective assessment of the passage, it would have (or should have) concluded that its reading was prejudicial to Mr. Lucero on the facts of this case in at least three respects.

First, by introducing the Bible to the jury room and reading it during deliberations, the foreman introduced an entirely new set of laws and instructions from what many jurors would consider to be a higher authority than the trial court. Many people of religious background, presumably including many of the jurors here, consider God to be the ultimate Authority and consider the Bible to reflect God's precepts. Thus, rather than being tantamount to the trial court's jury instructions, as the lower court suggested, the Bible introduced a competing set of laws and instructions into the jury room – and one that many jurors would follow before following the trial court's instructions. *Harlan*, 109 P.3d at 630; *Jones v. Kemp*, 706 F. Supp. 1534, 1599 (N.D. Ga. 1989).

Second, as discussed above, Romans 13:1-6 encourages jurors to follow the will of the State (prosecution), not the trial court. Paul, writing in the first century, does not consider or address the separation of the judicial and executive power; his words do nothing to differentiate between obedience to a judge in a courtroom and obedience to the executive on the street. Romans 13 speaks instead of "governing authorities" of the Roman Empire generally, recognizing only those who "bear the sword" and those who do not. *See Harlan*, 109 P.3d at 631 ("The Romans text instructs human beings to obey the civil government. Here, the State of Colorado was seeking the death penalty.").

Accordingly, the average juror would understand Romans 13:1-6 to command obedience to the prosecution, "The State of Texas." The State wanted the jury to impose death on Mr. Lucero. There can be little doubt that this was the purpose of the foreman's reading of the passage during a time at which several jurors were unwilling to impose death on Mr. Lucero. Non-judicial sources concur that Romans 13, when read out of context as it was by Mr. Lucero's jury, appears to be "an unequivocal, unrelenting call for obedience to the state" and its punishments. Jan Botha, *Subject to Whose Authority? Multiple Readings of Romans 13* 1 (1994); *see also* Leander E. Keck, *Romans* 311 (2005). The passage further suggests that the State's punishments are invariably just, visited only on the deserving. Keck, *supra*, at 315; Botha, *supra*, at 205.

Moreover, many, including one member of this Court, agree that Paul's mention of the "sword" refers specifically to the authority to sentence criminals to death. Antonin Scalia, *God's Justice and Ours*, First Things, May 2002, available at http://www.firstthings.com/article.php3?id_article=2022 (stating that the sword is "unmistakably a reference to the death penalty"); Southern Baptist Convention Resolution No. 5 (2000), available at http://www.sbcannualmeeting.org/sbc00/res.asp?ID=1295130452&page=0&num=10 (same); Botha, *supra* at 205 (same); C.K. Barrett, *A Commentary on the Epistle to the Romans* 247 (1957) (stating that the sword is a reference to the *jus gladii*, an authority to inflict a death sentence). *But see* Keck, *supra*, at 315 (suggesting the sword does not refer to the *jus gladii* but rather the general Roman law enforcement power); Anthony J. Guerra, *Romans and the apologetic tradition* 162 (1995) (suggesting that the sword refers to Roman military power or an imperial dagger).

Third, Romans 13:1-6 is inconsistent with the jury's function as a check on the State's actions regarding criminal punishment. The Romans text portrays the first-century Christian not as an active participant in a political community, but rather, as a private citizen confronted with the "sword" of imperial authority. His role is not to actively pursue justice or make policy but to "submit." The illustrative act is to pay taxes: the imperial authority requests a particular action (to pay a particular amount of money) and the Christian performs it.

That passive vision of Christian political life is inconsistent with the duty of a juror to evaluate the prosecution's case critically and ensure that the prosecution meets its high burden of proof. The Constitution requires more than passive obedience; the jury must actively decide whether the facts are such that it should "strip a man of his liberty or his life." *Turner*, 379 U.S. at 472. A capital sentencing jury, in particular, must exercise "the truly awesome responsibility" of determining life or death. *Caldwell v. Mississippi*, 472 U.S. 320, 329-30 (1985) (quoting *McGautha v. California*, 402 U.S. 183, 208 (1971)). Indeed, the jury's active role is so important that this Court has held that a prosecutor's suggestion that "responsibility for any ultimate determination of death will rest with others" violates the Eighth Amendment. *Id.* at 333. Such a suggestion "presents an intolerable danger that the jury will in fact choose to minimize the importance of its role." *Id.*

The "intolerable danger" of the jury minimizing the importance of its role is even easier to imagine where the jury is being urged to "delegat[e] ultimate responsibility for imposing a sentence to divine authority." *See, e.g., Sandoval v. Calderon*, 241 F.3d 765, 776-77 (9th Cir. 2000). In *Sandoval*, a prosecutor responded to defense counsel's suggestion that the jury should not "play God" with the defendant's life by reciting Romans 13: 1-5 and telling the jury: "You are not playing God. You are doing what God says." *Id.* at 775 n.1. The court found not only that the prosecutor violated the Eighth Amendment, but that the "eloquent" and

"powerful" language "was strong medicine" that prejudiced the defendant. *Id.* at 778. Such strong medicine also was likely to prejudice Mr. Lucero.

Accordingly, the Texas Court of Criminal Appeals erred in concluding beyond a reasonable doubt that the introduction of Romans 13:1-6 to the jury deliberations in Mr. Lucero's trial did not result in Mr. Lucero's death sentence. This Court should reverse the appellate court's judgment and remand the case for a new sentencing hearing.

C. Federal Law Requires The Texas Courts To Provide Mr. Lucero An Evidentiary Hearing To Test The Veracity Of Juror Affidavits.

Even if the Texas courts were permitted to inquire into the subjective intent of jurors and try to reconstruct their deliberations as if the error had not occurred, the order of the lower court still should be vacated because Mr. Lucero was not in any way afforded his basic, fundamental right to test the veracity of those affidavits, including through cross-examination of the jurors. Instead, the Texas courts simply accepted the jurors' affidavits at their face value as accurate and truthful. Pet. App. 19a-20a. That blind acceptance was error and violated Mr. Lucero's due process right to be heard and meaningfully develop a factual record on the issue. Whatever discretion a trial court possesses in investigating the jury, "the rule of juror incompetency cannot be applied in such an unfair manner as to deny due process." *Schillcutt v.*

Gagnon, 827 F.2d 1155, 1159 (7th Cir. 1987). "This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Smith v. Phillips*, 455 U.S. 209, 215 (1982) (citing *Remmer*, 347 U.S. at 230).

In this case, the State has admitted that an extraneous Bible was considered. Assuming that the private thoughts of the jurors were an appropriate basis on which to base a decision that the introduction and reading of the Bible in the jury room were harmless, it would be an abuse of discretion for the Texas courts to resolve that question on the basis of affidavits alone where Mr. Lucero was not given a procedural opportunity to challenge those affidavits or otherwise test the veracity of the statements in them. "Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." *Id.* at 216 (quoting *Dennis v. United States*, 339 U.S. 162, 171-72 (1950)). While the testimony of jurors may not be "inherently suspect," *Smith*, 455 U.S. at 217 n.7, neither is it inherently believable, especially when viewed only on the cold record of affidavits rather than live testimony subject to cross-examination. If the subjective memories of the jurors were relevant to whether the admitted error was harmless, Mr. Lucero would naturally wish to probe whether those memories are accurate or the result of hindsight bias. The only way in which that could be done is at an evidentiary hearing.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 13, 2008

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Appendix A

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

JIMMIE URBANO LUCERO, Appellant

NO. AP-75,247

v.

THE STATE OF TEXAS

ON DIRECT APPEAL
FROM CAUSE NO. 48593-C FROM
THE 251ST DISTRICT COURT
POTTER COUNTY

HERVEY, J., delivered the opinion of the Court in which KELLER, P.J., MEYERS, WOMACK, KEASLER, HOLCOMB and COCHRAN, JJ., joined. PRICE and JOHNSON, JJ, concurred.

OPINION

Appellant was convicted on May 23, 2005, of murdering three of his neighbors during the same

criminal transaction. TEX. PEN. CODE ANN., §19.03(a)(7)(A).[1] Pursuant to the jury's answers to the special issues set forth in TEX. CODE CRIM. PROC., Article 37.071, §§2(b) and 2(e), the trial judge sentenced appellant to death. Finding no merit in any of the seven points of error raised by appellant in this direct appeal, we affirm.

Points of error one and two relate to a juror misconduct claim that appellant raised in a motion for new trial. Appellant asserts in point of error one that the trial court erred in denying him a hearing on his juror misconduct claim.[2] He asserts in point of error two that the jury committed misconduct under the United States Constitution when it considered Biblical scripture during the punishment-phase deliberations.[3]

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[1] On the morning of September 6, 2003, the 45-year old appellant entered his neighbor's property and murdered three members of the Robledo family with a shotgun. Pedro Robledo, his wife, Manuela Robledo, and their daughter Fabiana Robledo were murdered. Appellant also attempted to murder the Robledo's other two children, Socorro and Guadalupe Robledo, who both testified at trial. Socorro testified that he escaped on foot without injury, and Guadalupe testified that appellant cornered her, Fabiana, and Fabiana's 18-month old son in a bedroom. Appellant shot Guadalupe in the arm and murdered Fabiana after pulling her son from her arms.

[2] **Point of error one**: Did the trial court abuse its discretion and commit reversible error in denying appellant an evidentiary hearing on the issue of scripture reading by the jury foreman during punishment deliberations?

[3] **Point of error two**: Was appellant denied his rights to an impartial jury and punishment determination in violation of

The record reflects that appellant filed new trial motions (an original and an amended motion for new trial). These motions alleged that the jury foreman read Biblical scripture to the jury at the beginning of the punishment-phase deliberations after an initial straw vote showing that two jurors were unwilling to answer the special issues in a way that required appellant to be sentenced to death. These motions alleged:

> After retiring to deliberate on the issue of punishment, the jury foreman conducted an initial straw vote on both of the statutorily mandated special issues which addressed the probability that Defendant would commit criminal acts of violence in the future so as to constitute a continuing threat to society (special issue number 1) and whether there existed sufficient mitigating circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed (special issue number 2). This initial vote revealed a majority of ten jurors who were prepared to vote "yes" to special issue number 1 and "no" to special issue number 2, thus necessitating the

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the Sixth, Eighth, and Fourteenth Amendments to the Unites States Constitution when jurors considered Biblical scripture during its deliberations at the punishment phase of appellant's trial and before it rendered its final verdict?

imposition of the death penalty. The remaining two jurors indicated their unwillingness to vote in such a way in which the death penalty would be imposed. At this juncture, the jury foreman produced his personal Bible and read to all members of the jury scripture from the Bible. This scripture addressed a Christian's duty to obey and consent to the laws of man.[4] It also informed the listeners

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[4] The record reflects that the jury foreman read Romans 13:1-6, from the New Testament of the New International Version of the Bible. Romans 13:1-6, provides:

> [1]Everyone must submit himself to the governing authorities, for there is no authority except that which God has established. The authorities that exist have been established by God. [2]Consequently, he who rebels against the authority is rebelling against what God has instituted, and those who do so will bring judgment on themselves. [3]For rulers hold no terror for those who do right, but for those who do wrong. Do you want to be free from fear of the one in authority? Then do what is right and he will commend you. [4]For he is God's servant to do you good. But if you do wrong, be afraid, for he does not bear the sword for nothing. He is God's servant, an agent of wrath to bring punishment on the wrongdoer. [5]Therefore, it is necessary to submit to the authorities, not only because of possible punishment but also because of conscience. [6]This is also why you pay taxes, for the authorities are God's servants, who give their full time to governing.

that those who opposed authority would experience condemnation.[5]

The content of this scripture had the desired effect of coercing the two dissenting jurors to change their votes in order to insure a unanimous tally on both special issues. Thus, the receipt of the biblical scripture by the jury infringed on each individual juror's duty to base their verdict only on evidence received at trial. This receipt of other evidence was detrimental to Defendant's constitutional guarantee that the verdict at the punishment phase of the trial be truly unanimous, free from coercion and the product of the juror's individualized assessment of evidence lawfully admitted into during (sic) the punishment phase of the trial.

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[5] Appellant claims on appeal that the Biblical scripture read by the foreman "had to do with a Christian's duty and responsibility to carry out the dictates of secular law" which "includes society's and this state's validation of the legality of capital punishment." He further asserts that:

> [T]his extra-judicial code of law requires a mortal's submission to civil law and that includes the imposition of capital punishment. In this regard, reference to Romans 13:1-6 carries with it a high potential of influencing a jury's deliberations on the issue of life or death.

Appellant supported these allegations with an affidavit from one of the jurors (juror No. 7). This affidavit states:

> I served as a juror in the case styled *The State of Texas v. Jimmie Urban Luccro* in the 251st District Court in Potter County, Texas. During jury deliberations at the punishment phase of the trial, I recall that the jury foreman suggested that we take a "straw vote" or a preliminary vote on the two special issues to see where we, as the jury were. The initial vote on both special issues showed 10 jurors were in favor of answering the questions in a way in which the death penalty would be imposed. The remaining two jurors were unwilling to answer those questions in a way in which the death penalty would be imposed. It was at this point in time that the jury foreman took out a Bible which he had with him. He read some scripture from the Bible. This scripture had to do with a Christian's duty to obey, conform and consent to the will and laws of man. This reading of scripture occurred before the final votes were taken by the jury on the two special issues regarding the probability that the Defendant would commit criminal acts of violence in the future and the sufficiency of

> mitigating evidence which would justify a life sentence in place of the death penalty. Although there was not a unanimous vote by the jury as a whole on the two special issues before the reading of the scripture, the vote was unanimous on both special issues some time after the reading of scripture. The foreman of the jury then informed the bailiff and the Court that we had reached a unanimous verdict which called for the death penalty against Jimmie Lucero.

Appellant claimed that the Bible reading by the jury foreman was an improper "outside influence" under TEX. R. EVID. 606(b), which generally prohibits a juror from testifying about jury deliberations for the purpose of impeaching the jury's verdict with an exception to this general rule being that a juror may testify "whether any outside influence was improperly brought to bear upon any juror."[6] Appellant further claimed that it was

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[6] Rule 606 provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the jury's deliberations, or to the effect of anything on any juror's mind or emotions or mental processes, as influencing any juror's assent to or dissent from the verdict or indictment. Nor may a juror's affidavit or any statement by a juror concerning any matter about which the juror would be precluded from testifying be admitted in evidence for any of these purposes.

mandatory for the trial court to hold a hearing on his new trial motions so that appellant could "develop the circumstances of the Bible reading and the exact content of the biblical verse read by the foreman to the entire jury."

Appellant also claimed in his new trial motions that he was entitled to a hearing on these motions because "key jurors refuse[d] to discuss the matter with counsel or with any representative of counsel." He further claimed that "[o]nly through compulsory process and sworn testimony from key jurors at a hearing can all relevant facts be developed for this Court's ultimate determination of the merits underlying Defendant's motion." Appellant's counsel filed an affidavit in support of these allegations. The affidavit indicates that only three jurors (Nos. 1, 8, and 12) declined to discuss the case with appellant's counsel. It also specifically states counsel did discuss the case with jurors numbered 2, 3, 4, 5, 6, 7, and 11. No mention is made of juror No. 9 or No. 10. Thus, it appears nine out of twelve jurors did discuss the case with appellant's counsel before he filed his new trial motions supported only by juror No. 7's affidavit.

Relying primarily on civil cases, the State's response asserted that the Bible reading was not an "outside influence" and that appellant was, therefore,

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However, a juror may testify: (1) whether any outside influence was improperly brought to bear upon any juror; or (2) to rebut a claim that the juror was not qualified to serve.

improperly attempting to impeach the jury's verdict under Rule 606(b). *See, Golden Eagle Archery Inc. v. Jackson*, 24 S.W.3d 362, 366-75 (Tex. 2000) (rules contemplate that an "outside influence" originates from sources other than the jurors themselves); *Brandt v. Surber*, 194 S.W. 3d 108, 134 (Tex.App.–Corpus Christi 2006, pet. denied) (a jury's discussion of newspaper articles is not an "outside influence); *Easly v. State*, 163 S.W.3d 839, 842 (Tex.App.–Dallas 2005, no pet.) (a chart brought into jury room with calculations of time appellant would serve in prison after application of the parol laws is not an "outside influence"); *Perry v. Safeco Ins. Co.*, 821 S.W.2d 279, 281 (Tex.App.–Houston [1st Dist.] 1991, writ denied) (juror using dictionary to share a definition with other jurors is not an "outside influence").

It is also imperative to note that the State submitted affidavits from all twelve jurors, all of which indicated that the verdict was not affected by the brief reading of Biblical scripture near the beginning of the hours-long jury deliberations. The two jurors who changed their votes after the preliminary vote unequivocally stated that the reading of the scripture and its content had no effect on their votes on the issues presented to the jury. Juror No. 3 stated:

> When the first vote was taken, I was not ready to vote because I was overwhelmed and too emotional. As a result, I initially voted in a way that a life sentence rather than the death sentence was imposed. The case was

difficult for me, among other reasons, at least because, I, like the defendant, came from a large family, had a brother about the same age of the defendant, and the defendant's mother was near the age of my mother. I wanted to take time, discuss the evidence, think about the trial, and feel clear about my decision ...

After going back into the jury deliberation room during the punishment stage, I recall the juror foreperson read some scripture, saying that he was comforted by the scripture. The foreman said that we may or may not find comfort in the scripture. I do not recall the Chapter and verse of the scripture read. The scripture was not read in a way to force us to agree with it. The jury was not asked to agree with the scripture that was read or to change our decisions based upon its reading ...

The reading of the Bible and the comfort comment probably took less than 2 and ½ minutes out of several hours of deliberations discussing the charged law and the facts. No other scripture was read or discussed ...

I do not believe that the reading of the scripture violated the principles of

> justice. In my opinion, the reading of the scripture did not violate any right of the defendant. The scripture reading was not utilized in a way to bring prejudice against the defendant. Moreover, in the overall scheme of about a two week trial and several hours of deliberations, the above Bible reading was not related to the verdict returned to the court.

The second of the two jurors to change their vote stated:

> When the first vote was taken, I did not vote in a way in which the death penalty was to be assessed. The negative vote was on the first of the two questions the jury had to answer regarding a continuing threat to society. So, I initially voted in a way that a life sentence rather than the death sentence was imposed. After going back into the jury deliberation room during the punishment deliberations and after the first vote, the jury foreperson read some Bible verses. The scripture was not read in a way to force us to agree with it. The jury was not asked to agree with the scripture that was read or to change our decisions based upon its reading or content. I did not feel I was going to be condemned if I did not vote for a

> particular verdict or answer a question in a particular way. . . . I am today comfortable with my votes and individual decision I made during my service on this jury. We followed the court's instructions.
>
> The reading of the Bible took probably less than 2 minutes out of several hours of deliberations discussing the charged law and facts . . . . There was no suggestion that the Bible should be consulted on factual issues as opposed to the evidence presented at the trial . . . . In my opinion, based upon the discussions during jury deliberations, our decision was based upon the evidence presented during the course of the trial from the witness stand not on the reading of the scripture. My individual guilt and punishment determinations were based upon the law and evidence presented at trial not the Bible.

All twelve jurors believed that the scripture reading did not violate any right of the defendant and that the defendant received a fair and impartial trial. The juror who read the scripture to the other jurors stated:

> The reading of this scripture was not an attempt on my part to convince any juror to vote in a way that would

> result in the death penalty. I wanted to read scripture because of the seriousness of the decision at hand and to suggest that the man's law as charged in the judge's instructions should be followed. There was no suggestion that the Bible had the answer on the questions regarding whether a life sentence or a death sentence should be imposed. There was no suggestion that the Bible should be consulted as the legal authority contradicting the law of the court's instructions. There was no suggestion that the Bible should be consulted on factual issues as opposed to the evidence presented at the trial.

All twelve jurors indicated that there was no discussion that Biblical principles should be considered or applied in defendant's case. More specifically, Juror No. 7 addressed any misconception that may have been construed from the affidavit previously obtained by appellant's counsel:

> The reading of the Bible and any accompanying comment probably took less than 3 minutes out of several hours of deliberations discussing the charged law and the facts. No other scripture was read or discussed. There was no passage read suggesting that a murderer should be executed under Biblical law. There was no

Bible passage read about the principal of a limb for a limb or an eye for an eye or tooth for a tooth. There was no discussion that such a Biblical principle should be considered or applied in this case to the Defendant, Jimmie Urbano Lucero.

There was no suggestion that the scripture reading was to convince any juror to vote in a way that would result in the death penalty. I do not believe that the reading of the scripture was meant to sway votes one way or the other. There was no suggestion that the Bible had the answer on the questions regarding whether a life sentence or a death sentence should be imposed. There was no suggestion that the Bible should be consulted on factual issues as opposed to the evidence presented at the trial. To my knowledge, the reading of the scripture did not cause anyone to change their vote or to vote in a way that would have resulted in a death penalty being imposed. In my opinion, based upon the discussions during jury deliberations, our decision was based upon the evidence presented during the course of the trial from the witness stand not on the reading of the scripture. From my observations, I think each member of

the jury gave his or her individual guilt and punishment determinations based upon the law and evidence presented at trial. This was certainly true for me.

I do not believe that the reading of the scripture violated the principles of justice. In my opinion, the reading of the scripture did not violate any right of the defendant. The scripture reading was not utilized in a way to bring prejudice against the defendant. I do not believe that there was any adverse judgment or opinion formed regarding the answers to the questions from the reading of the scripture or its content. I do not believe there was an detriment to the defendant caused by the reading of the scripture. I believe that the defendant received a fair and impartial trial. If I did not believe the defendant was accorded a fair trial, I would not be comfortable with my votes and the jury's verdict.

In my earlier affidavit signed through attorney Warren Clark, I did not mean to suggest that there was a connection between the reading of the scripture or its content and any member's ultimate vote in a way where the death penalty was assessed. Moreover, in the

> overall scheme of about a two week trial and several hours of deliberations, in my opinion, the above Bible reading was not related to the verdict returned to the court.

The trial court denied appellant's request for a hearing on his new trial motions. In a letter to the parties announcing its decision, the trial court stated:

> While I recognize that "sometimes trial courts choose to *wisely* make a full record of factual matters in death penalty cases", I believe that such action is contrary to the public policy being promoted by Rule 606(b) of the Texas Rules of Evidence, in that it would subject the jurors to the rigors of direct and cross examination regarding their deliberations. Such public scrutiny of confidential deliberations would discourage open discussion among jurors and could potentially be threatening to the entire jury process.
>
> To conduct a hearing simply to make a record, without any expectation that the hearing would result in admissible evidence, does not protect jurors from the inconvenience and potential harassment that such a hearing would impose. Therefore, under the present

circumstances, I do not believe that the Defendant has raised an issue which would require an evidentiary hearing.[7]

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[7] This is consistent with the rationale that has been expressed for the general rule of not permitting a juror to impeach his own verdict. *See State ex. rel. Rosenthal v. Poe*, 98 S.W.3d 194, 202 (Tex. Crim. App. 2003). For example, even in a case where a juror's affidavit indicated that the jury may have "adopted an unjust and arbitrary method" of arriving at its verdict, the United States Supreme Court stated:

> The rule [that a juror cannot impeach his own verdict] is based upon controlling considerations of a public policy which in these cases chooses the lesser of two evils. When the affidavit of a juror, as to the misconduct of himself or the other members of the jury, is made the basis of a motion for a new trial, the court must choose between redressing the injury of the private litigant and inflicting the public injury which would result if jurors were permitted to testify as to what had happened in the jury room.
>
> These two conflicting considerations are illustrated in the present case. If the facts were as stated in the affidavit, the jury adopted an arbitrary and unjust method in arriving at their verdict, and the defendant ought to have had relief, if the facts could have been proved by witnesses who were competent to testify in a proceeding to set aside the verdict. But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a

(Emphasis in original).

A defendant is entitled to an evidentiary hearing on his motion for new trial if the motion and accompanying affidavit(s) raise matters not determinable from the record, upon which the accused could be entitled to relief. *Wallace v. State*, 106 S.W.3d 103, 108 (Tex. Crim. App. 2003). We review the trial court's decision under an abuse of discretion standard. *Martinez v. State*, 74 S.W.3d 19, 22 (Tex. Crim. App. 2002).

Appellant claims on appeal that the trial court should have held a hearing on his new trial motions and that the reading of Biblical scripture during the punishment-phase deliberations denied his rights to an impartial jury and punishment determination in violation of the 6th, 8th, and 14th Amendments to the United States Constitution. The State claims that appellant procedurally defaulted these constitutional claims on appeal because he did not raise them in the trial court. The State also claims that the trial court did not abuse its discretion to deny appellant's request for a hearing on his new trial motions, because the matters described in juror No. 7's first affidavit do not constitute an "outside influence" and

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verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference.

See McDonald v. Pless, 238 U.S. 264, 267-68 (1915).

would, therefore, be excluded by Rule 606(b) at a motion for new trial hearing.[8]

We find it unnecessary to decide whether the jury foreman's Bible reading in this case was an "outside influence," because this record presents no "reasonable grounds" that this Bible reading affected the jury's verdict. *See Wallace v. State*, 106 S.W.3d at 108 (defendant is entitled to hearing on motion for new trial to make a record of matters not determinable from the record if the defendant establishes the existence of "reasonable grounds" showing that the defendant "could be entitled to relief"). The record presented to this Court indicates that this brief reading of Biblical scripture, which was essentially an admonishment to follow man's law (and, therefore, duplicated what was already in the court's charge), occurred near the beginning of jury deliberations. The affidavits clearly indicate that the scripture had no effect on the jury's verdict rendered some hours later.[9] We, therefore, cannot conclude that the trial court abused its discretion in declining to hold a hearing on appellant's new trial motions. For the same reason, any constitutional error that appellant may have preserved as a result

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[8] The State argues that "a juror's affidavit that described matters that did not constitute an 'outside influence' could not be used to support a live hearing on a motion for new trial based on jury misconduct.

[9] The record indicates that jury deliberations began at 12:20 pm and ended at 5:19 pm. The record also indicates that the scripture was read near the beginning of the deliberations, thus the jury deliberated for many hours after the scripture was read and before they rendered a final verdict.

of this Bible reading was harmless beyond a reasonable doubt. Points of error one and two are overruled.[10]

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[10] We also note the Ninth Circuit Court of Appeals' decision in *Fields v. Brown*, a state of California death-penalty case in which the jury foreman made notes "for" and "against" imposition of the death penalty after consulting the Bible and other texts. *See Fields v. Brown*, 503 F.3d 755, 776-82, 780 (9th Cir. 2007). The "for" notes included a reference to Romans 13:1-6, and to other Biblical scripture such as an "eye for an eye" and Exodus 21:12, which states, "He that smiteth a man, so that he dies, shall surely be put to death." *See id.* The jury foreman's "for" and "against" notes were shared with other jurors during punishment deliberations. *See id.*

The defendant presented a "number of juror declarations" to the federal district court in support of his claim that the references to the Bible and other texts during jury deliberations in the state court proceedings constituted jury misconduct. *See id.* The federal district court and the Ninth Circuit analyzed this claim under Federal Rule 606(b), which is more expansive than Texas Rule 606(b), because Federal Rule 606(b) permits jurors to testify "whether extraneous prejudicial information was brought to the jury's attention." *See Fields*, 503 F.3d at 776-83.

The federal district court struck most of the juror declarations as being inadmissible under Federal Rule 606(b). *See Fields*, 503 F.3d at 778. Based on what was left, the federal district court found "that the religious material in the [foreman's] notes was actually received by the jury, was available to it on the second day of deliberations, was discussed by some jurors, was presented at an early state of deliberations before a verdict was reached, and directly related to a material aspect of the case because the references indicated that the death penalty should be imposed in any case involving murder. *See id.* The federal district court concluded that "the jury's consideration of Biblical references offended the principle that

We understand appellant to claim in point of error three that the mitigating evidence instruction "unconstitutionally narrow[ed] the jury's discretion to factors concerning only moral blameworthiness.[11]

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religion may not play a role in the sentencing process, and that it had the potential to be highly prejudicial." *See id.*

In suggesting that the jury could properly consider the foreman's "for" and "against" notes, the Ninth Circuit stated that "the Biblical verses and the other concepts contained in the notes are notions of general currency that inform the moral judgment that capital-case jurors are called upon to make." *See Fields*, 503 F.3d at 780. The Ninth Circuit ultimately decided, however, that the jury foreman's notes were harmless, because they did not have a "substantial and injurious effect" on the jury's verdict. *See Fields*, 503 F.3d at 781-82. The Court stated:

> Whether or not [the jury foreman] should have brought his notes to the jury room and shared them, we cannot say that the Biblical part of the "for" part of the notes had a substantial and injurious effect on the verdict. His own notes had an "against" part as well. So far as we can tell, the communication occurred early on in the deliberations. Jurors could take as much time as they needed to sort through the evidence and reflect on whether the ultimate penalty was the right penalty. More importantly, the jury was instructed to base its decision on the facts and the law as stated by the judge, regardless of whether a juror agreed with it. We presume that jurors follow the instructions.

See id. (Footnote and citations to authority omitted).

[11] "Our understanding of the claim presented in appellant's third point of error is based on appellant's reference in his brief to his amended motion for new trial, which presented this

We have previously rejected this claim. *See Perry v. State*, 158 S.W.3d 438, 449 (Tex. Crim. App. 2005). Point of error three is overruled.

Appellant claims in point of error four that the trial court erroneously overruled his objections to the testimony of Royce Smithee,[12] who provided fact testimony about Texas prison conditions in general and opinion testimony that violence can occur within the Texas prison system.[13] Appellant claims Smithee's testimony was irrelevant under TEX. R. Evid. 401 and, therefore, would not aid the jury in determining a fact in issue under TEX. R. EVID. 702. The trial court ruled that Smithee could testify generally about the operations of the Texas prison

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specific claim to the trial court for the first time. The question appellant presents in point of error three is:

> Does Art. 37.071 sec. 2(f)(4) Code of Criminal Procedure violate the 5th, 6th, 8th and 14th Amendments to the United States Constitution as well as those principles underlying *Tennard v. Dretke*, 542 U.S. 2745, 124 S.Ct. 2562 (2004)?

[12] Smithee is the "chief investigator for the Special Prosecution Unit," which is a "prosecutor assistance program out of the governor's office" with the primary function "to investigate and prosecute, help the DA prosecute, criminal offenses that occur in the prison system and/or on state property."

[13] The question appellant presents in point of error four is:

> Did the trial court abuse its discretion in admitting Smithee's testimony concerning violence in prison and the inner workings of prison when the witness could not and did not opine that the circumstances, facts and events described by Smithee would specifically apply to Appellant in his situation?

system and offer an opinion that violence can occur there.

> [DEFENSE]: Judge, we don't believe that in this particular case–although, obviously we would be disagreeing on different grounds if Mr. Smithee were trying to draw directly to [appellant]. But with regard to this case, what the State's wanting to do is to not get into the actual future dangerousness mode, but try to make an illusion or a suggestion to the jury that because violent acts do occur in prison, that [appellant] is going to commit that.
>
> If they cannot individualize and show evidence particular to [appellant's] probability to commit future acts of violence in the future, then the evidence is not relevant.
>
> That's what their burden is–and that's what this gentleman will have to prove–showing the prison system is fine unless they're going to try to go into the fact that violence can occur in prison. But he can't give us any handle or any help as to whether or not this particular Defendant would be a violent risk in the future, so we believe it's not relevant under 702 and we would ask the Court to exclude him.

[THE COURT]: The objection as to relevance will be overruled.

Counsel, Mr. Smithee will be allowed to give factual testimony about the operations of the Institutional Division of the Texas Department of Criminal Justice, and I don't believe an opinion is necessary in any area.

[STATE]: I think, Your Honor, as far as opinion goes, the furtherest (sic) that he would be asking Mr. Smithee questions in that regard was if any inmate chose to commit an offense within the prison system, could they within the system as it's set up today, do that if they chose to do so. But we are not going to be applying that directly as to he just begs our question on that.

[DEFENSE]: I don't believe there's any question that an inmate could do that if they wanted to, you know, whether it be with their hands or otherwise. But they're trying to draw a parallel between this Defendant and general suggestions that they're going to say and they just simply can't do that. But they want to try to throw that out in front of the jury, so we believe that again–we're not trying to

> argue with the Court, I apologize, but that it should not be admissible.
>
> [THE COURT]: Okay. The objection will be overruled.
>
> Mr. Smithee will be entitled to give opinion testimony as to whether or not violence can occur within the system, and factual testimony about the operations of the Texas Department of Criminal Justice, Institutional Division, but would prohibit opinion testimony as to probability or any kind of specific percentages.

The record also reflects that, as part of its case at punishment, the defense claimed that "in an incarcerated setting, [appellant] is not going to be a problem" and that a life-sentenced appellant "would do well in prison." In addition to presenting Smithee's testimony that violence can occur within the Texas prison system,[14] the State also presented evidence that appellant had a "pattern of violence

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[14] For example, Smithee testified that a "defendant" within "the prison system" can be "as violent as he wants to be when that opportunity arises."

> Q. [STATE]: Is your testimony limited just to the fact that if a defendant chooses to exercise his choice and commit a violent crime within the prison system, is it your testimony that he will have the opportunity to do that?
>
> A. [SMITHEE]: An individual can be as violent as he wants to be when that opportunity arises.

that stretche[d] back for 20 years." This evidence included numerous assaults that appellant committed during this period of time against various people, including members of his own family, with some of these assaults involving firearms.

An issue for the jury's determination was appellant's future dangerousness. *See* Article 37.071(b)(1), TEX. CODE CRIM. PROC. The trial court did not abuse its discretion to decide that Smithee's testimony that inmate violence can occur under current prison conditions had some relevance to, and would have aided the jury in determining, appellant's future dangerousness, such as considering whether a life-sentenced appellant, with his history of assault behavior, would have opportunities to commit violent acts in prison. *See Threadgill v. State*, 146 S.W.3d 654, 670-71 (Tex. Crim. App. 2004) (trial court did not abuse its discretion to admit photographs of bombs and weapons made by inmates in Texas prison system because "evidence regarding weapons made by prison inmates was at least marginally relevant to the testimony concerning inmate violence within various classifications of prison society"); *Canales v. State*, 98 S.W.3d 690, 699 (Tex. Crim. App. 2003) (testimony regarding inmates' ability to defeat locking mechanisms on prison cell doors relevant to future dangerousness special issue).

Appellant also claims on appeal that the admission into evidence of Smithee's testimony violated his Eighth Amendment right to individualized sentencing. The record, however,

reflects that appellant did not present this Eighth Amendment claim to the trial court. He, therefore, failed to preserve this Eighth Amendment claim for appellate review. See TEX. R. APP. PROC. 33.1(a)(1). Point of error four is overruled.

In point of error five, appellant claims that the State delivered improper jury argument at the punishment phase.[15] The record reflects that appellant's brother testified at the punishment phase that appellant broke into his home in February 1995. Appellant was indicted for burglary as a result of this incident. Appellant's brother testified that he told a police officer the day after the incident that he did not want to press charges and that he later signed "a form with the District Attorney's office asking them to not prosecute" appellant.

> Q. [STATE]: Okay. Now, let's talk about since that day. You told the police officer that night or that next day that you did not want to press charges against [appellant]?
>
> A. [APPELLANT'S BROTHER]: Yes.

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[15] The question appellant presents in point of error five is:

> Was the prosecutor's assertion that Appellant's and his family's influence in persuading the prosecuting authorities to extend leniency for Appellant's involvement in a burglary of a family member's residence so prejudicial that it had a substantial and injurious effect or influence in determining the jury's answers to the special issues and therefore, affected Appellant's substantial right to a fair trial?

Q. And they did press charges against him, correct?

A. Correct.

Q. And later on, just a month or two later, basically, you changed your mind on that, didn't you, or you made a request of them. Is that a fair statement?

A. I believe so.

Q. What was that request?

A. I didn't want him to pay for any of the damages or anything like that.

Q. Did you also sign a form with the District Attorney's office asking them to not prosecute him?

A. I believe I did.

Q. What was your purpose in doing that?

A. I love him and respect him.

Appellant eventually received two years deferred-adjudication community supervision for that burglary offense pursuant to a plea bargain. During closing arguments, the State argued, over appellant's objection:

[STATE]: Mitigating evidence. You want to talk about that a little bit and we will for awhile. But right now, I want to particularly call your attention to one particular thing that they kept saying. You know, he's sorry, he's nice, he's a wonderful guy. Guess what folks? I submit to you that's the exact same thing he told the prosecutors back in 1995 and he got off light. He got a break because his family wanted him to have a break. And, Lord, help us, look where we are now. Because I'm sure that prosecutor thought long and hard about what to do because of the facts of the case–

[DEFENSE]: Judge, I'm going to object to that, that's inviting the jury to speculate outside the record.

[THE COURT]: The objection will be overruled.

[STATE]: –about the facts of that case, as well as the considerations that that family asked for leniency for their brother so he wouldn't have to testify. And they won the day and look where we are. You cannot allow them to win the day again. If you do, to whom and for what will we have to allow [appellant] to apologize for again?

Appellant claims that the State's "reference to facts suggesting that Appellant and his family took pains to influence the prosecution was not inferable from the evidence and as such, was wholly improper" by injecting into the trial "new facts harmful to Appellant." We decide that the State's argument was a reasonable deduction from brother Robert's testimony that he told a police officer that he did not want to press charges and that he believed that he later signed a form with the District Attorney's office not to prosecute appellant. *See Holberg v. State*, 38 S.W.3d 137, 141 (Tex. Crim. App. 2000) (a permissible area of jury argument is reasonable deduction from the evidence).

In addition, any error in the overruling of appellant's objection to the State's argument was harmless, because, on this record, any unsupported-by-the-record assertion that appellant's family may have influenced the authorities to show leniency on appellant in the 1995 burglary case had little, if any, influence on the jury's answers to the special issues. *See Johnson v. State*, 976 S.W.2d 410, 417 (Tex. Crim. App. 1998) (non-constitutional error is harmless when "the appellate court, after examining the record as a whole, has fair assurance that the error did not influence the jury, or had but a slight affect."). We believe that the jury's answers to the special issues turned primarily on the facts of the offense (the brutal murder of three neighbors in their home for no apparent reason) and appellant's history of assaultive conduct. We do not believe that the jury's answers to the special issues resulting in appellant's death sentence hinged on any efforts by

appellant's family to persuade the authorities to show leniency on appellant in the 1995 burglary case. *See id.* Point of error five is overruled.

We understand appellant to claim in point of error six that the trial court erroneously denied his request for a mistrial. He claims that he was entitled to a mistrial when the State's punishment-phase closing jury arguments directly commented on appellant's failure to take the stand at the punishment hearing to express remorse for murdering his three neighbors.[16]

The record reflects that appellant presented the testimony of a psychological expert (Schneider) whose testimony was based, in large part, on statements appellant made to him during a psychological evaluation after appellant committed the offense in this case. Schneider's written psychological evaluation of appellant was also introduced into evidence as Defense exhibit 1. Among other things, Schneider's written psychological evaluation of appellant concluded that "[p]ersonality assessment suggests [appellant] to be chronically depressed and to experience intense suspicion of others, to maintain a strict guardedness

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[16] The question appellant present in point of error six is:

> Did the trial court commit reversible error in failing to grant a mistrial as a result of the prosecutor's direct comment that Appellant had somehow neglected to demonstrate consideration or remorse for the crime of which he was convicted?

and distance from others and to feel some relative comfort only in solitary conditions."

Schneider testified consistently with his written psychological evaluation of appellant and also testified generally about "sociopathic behavior," with one of its indicators being "very little remorse." Schneider also testified that, with "the limited information" he had, he could not say "definitively" that appellant was "sociopathic,"[17] He also testified regarding appellant's demeanor during the evaluation, particularly "in specific reference" to this capital murder offense.

> Q. [DEFENSE]: What was his demeanor when he was talking with you on all these issues?
>
> A. [SCHNEIDER]: He was–he became–in specific reference to that incident, he became very quiet, very reserved, very guarded. I tried to,

---

[17] Schneider also testified on cross-examination that sociopaths "show little remorse."

> Q. [STATE]: Let's talk a minute about antisocial personality disorder. Can you give me some criteria for that, sir–well, let me ask you, would the criteria include failure to conform with social norms?
>
> A. [SCHNEIDER]: Yes.
>
> * * *
>
> Q. And those that show little remorse?
>
> A. Yes.

> kindly as possible, get as much information as possible, but he became tearful and he just chose not to talk about it.

This was consistent with Schneider's written psychological evaluation of appellant, which stated:

> Regarding the incident(s) in question, Mr. Lucero was asked if he remembered the incident(s). He stated, "Yes." When asked to describe what led up to the incident in question, Mr. Lucero became tearful and chose not to discuss the actual incident. He stated that it occurred in September 2003, that he was home "just by myself." When asked what occurred on that day, he stated, "I just don't want to talk about it." The subject became withdrawn, tearful and unresponsive to any type of inquiry. The interview was completed at that point.

We understand appellant to have claimed, during the State's closing jury arguments, that the following emphasized portion of the State's jury argument could only have been understood by the jury as a comment on appellant's failure to take the stand to express remorse:

> [STATE]: He's a good killer. He slaughtered and massacred the heart

of the Robledo family in less than 2 minutes. He killed Pedro, Manuela and Fabiana, shot at Soccorro, and but, for I'll submit to you, the grace of God, for Guadalupe to be turned sideways so that the shot went through her arm before it struck her body, or she would be dead, also. And she was fortunate enough not to cut a major artery in her arm and she still nearly died.

This Defendant did all that in the presence of an 18-month-old boy, who now fears sirens, fears police, fears ambulances; and those are the folks he's supposed to trust and believe in. Will he ever get over that? Who knows?

The thing we do know is he will have to live with it for the rest of his life. **We don't know whether he's concerned about it at all, folks.**[18] We really don't–

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[18] The record, therefore, does not necessarily support the assertion that the State's jury argument was a reference to appellant's lack of remorse. The State's jury argument that "[w]e don't know whether [appellant's] concerned about it at all, folks" was consistent with Schneider's testimony and his written evaluation setting out appellant's statement, "I just don't want to talk about it."

[DEFENSE]: Judge, I'm going to object - may we approach the bench? (On-the-record conference had at Bench:)

[DEFENSE]: Judge, that last comment was an overt comment on the failure of the Defendant to testify and we would object.

[THE COURT]: The objection will be sustained.

[DEFENSE]: We would ask for an instruction to the jury to disregard that, and after that instruction, we would move for a mistrial.

[THE COURT]: The motion for a mistrial will be denied. I will give you an instruction about the comment.

[DEFENSE]: Thank you, Judge.

(Proceedings had in open court)

[THE COURT]: Ladies and gentlemen, I will instruct you to disregard any comments or arguments by the Prosecution as to whether or not the Defendant is concerned and I'll leave it at that.

Mr. Simms.

> [STATE]: From the evidence submitted to you by their witnesses, there's no evidence of that. That's what I'm telling you, folks. There's no evidence of that, just like there's no evidence of remorse. There's no evidence that what transpired and what will transpire in prison that he will try to do anything to help any of those inmates.
>
> He's controlling. He's jealous. He's manipulative. He's impulsive. He's irritable. He's aggressive. He's reckless, with a disregard for the safety of others. He has irresponsible work behavior. And he shows little remorse.

(Emphasis supplied).

On this record, it is not clear that the jury would have naturally understood the State's argument that "[w]e don't know whether [appellant's] concerned about it at all, folks" as referring to appellant's failure to take the stand at punishment to express remorse. *See Ladd v. State*, 3 S.W.3d 547, 569 (Tex. Crim. App. 1999) (State's jury argument commenting on defendant's lack of remorse could have been interpreted by jury as referring to testimony of psychiatrist, who testified that defendant was a sociopath and had no remorse

for his crimes).[19] To the extent that the State's argument could have been so construed by the jury, appellant was not entitled to a mistrial, because the trial court's instruction to disregard was sufficient to cure any prejudice stemming from the State's argument. *See Young v. State*, 137 S.W.3d 65, 69 (Tex. Crim. App. 2004) (grant of mistrial motion should be reserved for those cases in which an objection could not have prevented, and an instruction to disregard could not have cured, the prejudice stemming from an event at trial); *Caldwell v. State*, 818 S.W.2d 790, 799-800 (Tex. Crim. App.

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[19] Arguably, on this record, it would have been permissible for the State to have commented on appellant's lack of expression of remorse during his evaluation by Schneider, because such a comment is supported by the record and is encompassed within Schneider's evaluation of appellant, particularly whether appellant has indicators or characteristics of a sociopath. *Compare Renteria v. State*, 206 S.W.3d 689, 697 fn.4 (Tex. Crim. App. 2006) (prosecutorial unsupported-by-the-record comment on defendant's lack of expression of remorse may be impermissible comment on defendant's failure to testify). The jury, therefore, could have manifestly and naturally understood the State's argument as a permissible reference to appellant's lack of expression of remorse during his evaluation by Schneider and not as an impermissible reference to appellant's failure to take the stand at the punishment hearing to express remorse. *See Cruz v. State*, 225 S.W.2d 546, 548 (Tex. Crim. App. 2007) (test to determine whether prosecutorial argument is comment on a defendant's failure to testify "is whether the language used was manifestly intended or was of such a character that the jury would necessarily and naturally take it as a comment on the defendant's failure to testify") (quoting *Bustamonte v. State*, 48 S.W.3d 761, 765 (Tex. Crim. App. 2001)).

1991)[20] (any improper jury argument by State alluding to defendant's lack of remorse was cured by trial court's instruction to disregard).[21] In addition, appellant failed to object to the State's subsequent jury arguments that "there's no evidence of remorse" and that appellant "shows little remorse." Appellant, therefore, is not entitled to a reversal due to the State's earlier objected-to reference to appellant's lack of remorse. *Cf. Leday v. State*, 983 S.W.2d 713, 718 (Tex Crim. App. 1998) (overruling of objection to evidence will not result in reversal when other such evidence was received without objection, either before or after the complained-of ruling).

In point of error seven, appellant appears to argue that Article 37.071, TEX. CODE CRIM. PROC., is unconstitutional because it fails "to provide a method by which the State of Texas determines the deathworthiness of a capital defendant."[22] Appellant

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[20] Overruled on other grounds by *Castillo v. State*, 913 S.W.2d 529, 532-35 (Tex. Crim. App. 1995).

[21] Appellant claims on appeal that the trial court's instruction to disregard was "tepid" and "not forceful enough to cure the error." The record, however, reflects that appellant made no such claim at trial. In addition, appellant's argument that the trial court's instruction to disregard "was not forceful enough to cure the error" effectively concedes that any prejudice in the argument was curable by an instruction to disregard.

[22] The question appellant presents in point of error seven is:

> Does Art. 37.071 of the Texas Code of Criminal Procedure fail to provide a method by which the State of Texas determines the deathworthiness of a capital defendant, thereby eliminating consistency in the decision to seek the death penalty and weakening the

relies primarily on the Supreme Court's decision in *Bush v. Gore*, 531 U.S. 98 (2000). We have rejected the arguments that appellant appears to present in this point of error. *See Threadgill v. State*, 146 S.W.3d at 671-72 (rejecting defendant's argument that "because Article 37.071 fails to provide a mechanism by which the State determines the death worthiness of the Defendant, it does not provide 'some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied'"). Point of error seven is overruled.

The judgment of the trial court is affirmed.

Hervey, J.

Delivered: February 13, 2008
Publish

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degree of accuracy required in imposing death, in contravention of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution?

Appendix B

Cause No. 48.593-C

THE STATE OF TEXAS	§	IN THE 251ST DISTRICT
	§	COURT
v.	§	
	§	IN AND FOR
JIMMIE URBANO	§	
LUCERO	§	POTTER COUNTY,
	§	TEXAS

ORDER DENYING REQUEST FOR EVIDENTIARY HEARING

On this 2nd day of August, 2005, came on to be considered the Defendant's *Request for Evidentiary Hearing* filed in conjunction with the Defendant's *Motion for New Trial*. Having considered the arguments and authorities presented to the Court, the Court is of the opinion that the request should be denied.

IT IS, THEREFORE, ORDERED that the *Request for Evidentiary Hearing* is denied.

SIGNED this 2nd day of August, 2005.

/s/ Patrick A. Pirtle
Patrick A. Pirtle
Judge Presiding
251st Judicial District
Potter County, Texas

cc: District Clerk
District Attorney
Warren Clark

251ST JUDICIAL DISTRICT COURT

POTTER COUNTY COURTS BUILDING
500 S. FILLMORE
AMARILLO, TEXAS 79101
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Patrick A. Pirtle
Judge Presiding
Potter and
Randall Counties

Angela A. Johnson - Court Administrator
Debby Murphy - Court Reporter
Chuck Wieger - Bailiff

August 2, 2005

Mr. Warren L. Clark
Attorney at Law
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Mr. Randall Sims
47th District Attorney's Office
501 S. Fillmore, Suite 1A
Amarillo, Texas 79101

Re: Cause No. 48,593-C; *The State of Texas v. Jimmie Urbano Lucero*; In the 251st District Court, Potter County, Texas

Dear Counselors:

Upon receipt and review of the arguments and authorities presented to the Court, it is my reasoned judgment that the appropriate action for this Court to take is to deny the Defendant's *Request for Evidentiary Hearing*.

While I recognize that "sometimes trial courts choose to *wisely* make a full record of factual matters in death penalty cases", I believe that such action is contrary to the public policy being promoted by Rule 606(b) of the Texas Rules of Evidence, in that it would subject the jurors to the rigors of direct and cross examination regarding their deliberations. Such public scrutiny of confidential deliberations would discourage open discussion among jurors and could potentially be threatening to the entire jury process.

To conduct a hearing simply to make a record, without any expectation that the hearing would result in admissible evidence, does not protect jurors from the inconvenience and potential harassment that such a hearing would impose. Therefore, under the present circumstances, I do not believe that the Defendant has raised an issue which would require an evidentiary hearing.

I am enclosing herewith a copy of the *Order Denying Request for Evidentiary Hearing* which I have signed and entered this date.

Sincerely,

/s/ Patrick A. Pirtle
Patrick A. Pirtle

cc: District Clerk

Appendix C

No. 48,593-C

THE STATE OF TEXAS	X	IN THE 251st DISTRICT COURT
VS.	X	IN AND FOR
JIMMIE URBAN LUCERO	X	POTTER COUNTY, TEXAS

MOTION FOR NEW TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, JIMMIE URBAN LUCERO, Defendant in the above-referenced and numbered cause, files this his Motion for New Trial and in support thereof would show the Court as follows:

I.

After retiring to deliberate on the issue of punishment, the jury foreman conducted an initial straw vote on both of the statutorily mandated special issues which addressed the probability that Defendant would commit criminal acts of violence in the future so as to constitute a continuing threat to society (special issue number 1) and whether there existed sufficient mitigating circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed (special issue

number 2). This initial vote revealed a majority of ten jurors who were prepared to vote "yes" to special issue number 1 and "no" to special issue number 2, thus necessitating the imposition of the death penalty. The remaining two jurors indicated their unwillingness to vote in such a way in which the death penalty would be imposed. At this juncture, the jury foreman produced his personal Bible and read to all members of the jury scripture from that Bible. This scripture addressed a Christian's duty to obey and consent to the laws of man. It also informed the listeners that those who opposed authority would experience condemnation.

The content of this scripture had the desired effect of coercing the two dissenting jurors to change their votes in order to insure a unanimous tally on both special issues. Thus, the receipt of the biblical scripture by the jury infringed on each individual juror's duty to base their verdict only on evidence received at trial. This receipt of other evidence was detrimental to Defendant's constitutional guarantee that the verdict at the punishment phase of the trial be truly unanimous, free from coercion and the product of the juror's individualized assessment of evidence lawfully admitted into during the punishment phase of the trial.

II.

In support of this motion, Defendant attaches the sworn affidavit of Juror Willa Warren.

III.

Defendant requests an evidentiary hearing so that he may adduce facts not in the record relevant to the issue described within.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that upon hearing hereon, the Court grant this motion in its entirety and order a whole new trial on the merits.

Respectfully submitted,

WARREN L. CLARK
ATTORNEY AT LAW
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806/371-9610 (fax)

/s/ Warren L. Clark
Attorney for Defendant
SBN 04300500

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion For New Trial was provided to the office of the Potter County D.A.'s Office on this the 23 day of June, 2005.

/s/ Warren L. Clark
Warren L. Clark

JUROR AFFIDAVIT

My name is Willa Warren. I am over the age of 21 years of age, of sound mind and wish to state the following:

I served as a juror in the case styled *The State of Texas v. Jimmie Urban Lucero* in the 251st District Court in Potter County, Texas. During jury deliberations at the punishment phase of the trial, I recall that the jury foreman suggested that we take a "straw vote" or a preliminary vote on the two special issues to see where we, as the jury were. The initial vote on both special issues showed 10 jurors were in favor of answer the questions in a way in which the death penalty would be imposed. The remaining two jurors were unwilling to answer those questions in a way in which the death penalty would be imposed. It was a this point in time that the jury foreman took out a Bible which he had with him. He read some scripture from the Bible. This scripture had to do with a Christian's duty to obey, conform and consent to the will and laws of man. This reading of scripture occurred before the final votes were taken by the jury on the two special issues regarding the probability that the Defendant would commit criminal acts of violence in the future and sufficiency of mitigating evidence which

would justify a life sentence in place of the death penalty. Although there was not a unanimous vote by the jury as a whole on the two special issues before the reading of the scripture, the vote was unanimous on both special issues some time after the reading of scripture. The foreman of the jury then informed the bailiff and the Court that we had reached a unanimous verdict which called for the death penalty against Jimmie Lucero.

Signed this 23rd day of June, 2005.

/s/ Willa Warren
Willa Warren

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned authority, on this 23d day of June, 2005.

/s/ J. Lynda Smith
Notary Public in and for
State of Texas

Appendix D

251ST JUDICIAL DISTRICT COURT

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June 30, 2005

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Amarillo, Texas 79101

Re: Cause No. 48,593-C; *The State of Texas v. Jimmie Urbano Lucero;* In the 251st District Court, Potter County, Texas

Dear Counselors:

I am in receipt of Mr. Clark's *Motion for New Trial* pertaining to the above-entitled and numbered cause and his letter requesting an evidentiary hearing with respect to the issue raised therein. My preliminary research has caused me some concern with respect to the propriety of conducting such a hearing.

A motion for new trial supported only by inadmissible statements does not raise a matter upon which an appellant could be entitled to relief. There is no requirement for a hearing if the motion for new trial and supporting affidavits are not adequate to place the trial court on notice that reasonable grounds for a new trial exist. *Jordan v. State, 883 S.W.2d 664* (Tex.Crim.App). 1994. Affidavit testimony to support a motion for new trial states reasonable grounds only if the matter discussed in the affidavit would be admissible in a subsequent hearing on the motion. *Dunkins v. State*, 8338 S.W.2d 894 (Tex.App.-Texarkana 1992, pet. ref'd).

The Defendant's *Motion for New Trial* in this case is supported by the affidavit of one juror, Willa Warren, in which she discusses matters allegedly occurring during jury deliberations. Rule 606(b) of the Texas Rules of Evidence provides that a juror "may not testify as to any matter or statement occurring during the jury's deliberations, of to the effect of anything on any juror's mind or emotions or mental processes, as influencing any juror's assent to or dissent from the verdict or indictment." This rule

of evidence has been construed to narrowly limit a juror's ability to testify to two specific situations: (1) whether any outside influence was improperly brought to bear upon a juror; and (2) to rebut a claim that the juror was not qualified to serve. Therefore, I believe that a serious question exists with respect to the admissibility of Ms. Warren's affidavit, or testimony.

Under such circumstances, it has been held that a trial court does not commit reversible error by declining to set a hearing or by declining to grant a motion for new trial. *Rhinehardt v. State*, 2003 W.L. 21674198 (Tex.App.-El Paso).

Based upon the above sand foregoing authorities, I am going to defer setting a hearing on this matter for a period of not less than 30 days. To assist the Court, I would request that counsel submit briefs on this issue prior to July 29, 2005. After that date, I will make a decision as to whether or not grant the Defendant's request for a hearing.

Sincerely,

/s/ Patrick A. Pirtle
Patrick A. Pirtle

cc: District Clerk

Appendix E

No. 48,593-C

THE STATE OF TEXAS	X	IN THE 251st DISTRICT COURT
VS.	X	IN AND FOR
JIMMIE URBAN LUCERO	X	POTTER COUNTY, TEXAS

MEMORANDUM OF LAW IN SUPPORT OF REQUEST FOR EVIDENTIARY HEARING

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, JIMMIE URBANO LUCERO, hereinafter referred to as Defendant, files this his Memorandum of Law in Support of Request for Evidentiary Hearing and in support thereof would show the Court as follows:

I.

On June 23, 2005, Defendant filed his Motion For New Trial which attached a sworn juror affidavit describing the introduction of Bible scripture by the jury foreman during punishment deliberations. According to the juror affidavit, the entire jury was exposed to the Bible reading at a time before the jury reached a unanimous verdict on the two statutorily mandated special issues which eventually resulted in

the trial court's imposition of the death penalty against Defendant.

On June 24, 2005, Defendant filed his Amended Motion For New Trial in which he added an additional ground of relief. This specific ground seeks to declare Art. 37.071 unconstitutional based on the rationale of *Tennard v. Dretke*, 542 U.S. ___, 124 S.Ct. 2562 (2004).

On June 30, 2005, the trial court communicated by letter to respective counsel and expressed doubt as to whether Defendant is entitled to a hearing on the motions for new trial filed in the cause. Specifically, the Court requested that the parties address the issue of whether Rule 606(b) Texas Rules of Evidence permits testimony from juror Willa Warren and others similarly situated concerning the subject matter of the Bible reading. As undersigned interprets the Court's letter, the key issue is whether the act of Bible reading in the presence of all jurors during jury deliberations on punishment and before a final vote on the two special issues constitutes an "outside influence improperly brought to bear upon a juror," thus constituting one of two identified situations where a juror may testify to a matter which occurred during jury deliberations. Defendant submits that the answer to this inquiry is a resounding "yes." Therefore, Defendant is entitled to an evidentiary hearing on his new trial motion in accordance with Rule 21.3(f) Texas Rules of Appellate Procedure.

II.

What is an "outside influence?"

The rule contemplates that an "outside influence" originates from sources *other* than the jurors themselves. *Ford v. State*, 129 S.W.3d 541, 550 (Tex.Ct.App.-Dallas 2003, pet. ref'd.); *Wooten v. S. Pac. Transp. Co.*, 928 S.W.2d 76, 78-79 (Tex.Ct.App.-Houston [14th Dist.] 1995, no writ.). "Outside influence" has also been understood to mean a force *external* to the jury and its deliberations. *Sanchez v. King, et al*, 932 S.W.2d 177, 183 (Tex.Ct.App.-El Paso 1996, no writ).

What constitutes an "outside influence?"

Extant Texas cases address a wide range of events, objects or forms of communication which constitute "outside influences" for purposes of analyzing adverse evidence received by a jury. The list runs from media coverage, *Drew v. State*, 76 S.W. 436, 460 (Tex.Ct.App.-Houston [14th Dist.] 2002, pet. ref'd.), *cert. denied* 123 S.Ct. 601 (2002) to photographs not admitted into evidence, *Carroll v. State*, 990 S.W.2d 761 (Tex.Ct.App.-Austin 1999, no pet.) to newspaper articles, *Knorpp v. State*, 645 S.W.2d 892 (Tex.Ct.App.-El Paso 1983, no pet.).

Persuasive authority provides other illustrations of a wide variety of "outside influences." They range from use of a Reader's Digest guide, entitled "You and the Law," *Moore v. State*, 172 Ga. App. 844, 324 S.E.2d 760 (1984) to the use of a

dictionary in jury deliberations, *Alvarez v. People*, 653 P.2d 1127 (Colo. 1982); *Smith v. State*, 95 So. 2d 525 (Fla. 1957); *Palestroni v. Jacobs*, 77 A.2d 183, 10 N.J. Super. 266 (1950). Use of an almanac has been considered to be an "outside influence." *Evans-Smith v. Commonwealth*, 361 S.E.2d 436, 447 (Va.Ct.App. 1987)

What about the reading of Biblical passages among the jurors during deliberations?

To this writer's knowledge, there appear to be no Texas cases directly on point concerning the issue at hand. However, there are several opinions from sister states which address the subject. In *People v. Harlan*, 109 P.3d 616, slip opinion no. 03SA173, delivered April 18, 2005 (Co. 2005), the Colorado Supreme Court found that the reading of Leviticus and Romans during jury deliberations in a capital murder case constituted "extraneous information" barred by appropriate state statutory and constitutional provisions. Likewise, in *Glossip v. State*, 29 P.3d 597, 604-05 (Okla. 2001), the Oklahoma Court of Criminal Appeals concluded that jurors' reading and reference to the Bible "and its verses" during jury deliberations "constituted receipt of extraneous material and an improper influence on the jury's deliberations." Parenthetically, it should be pointed out that Glossip acquired the go-ahead for his requested evidentiary hearing by attaching a juror affidavit noting discussion of and reading of the Bible by one or more jurors during deliberations. *Id.* at 604. And finally, in *May v. Kemp*, 706 F. Supp. 1534, 1558-59 (N.D. Ga. 1989), the federal district

court on habeas review found that the use of a Bible during jury deliberations in a state capital murder trial permitted the jury to decide issues with a aid of a "specific, extra-judicial code of conduct" which ultimately influenced the jury's deliberations in an unconstitutional manner. May's death sentence was set aside as a result.

III.

When is a defendant entitled to a hearing on a motion for new trial?

A defendant has a right to a hearing on a motion for new trial when the motion raises matters that cannot be determined from the existing record. *Reyes v. State*, 849 S.W.2d 812, 816 (Tex.Crim.App. 1993). If a defendant's motion for new trial and supporting affidavit are sufficient, a hearing on a motion for new trial is mandatory and the failure to afford the defendant such a hearing is a clear abuse of discretion. *Id.* at 816; *Bruno v. State*, 916 S.W.2d 4 ((Tex.Ct.App.-Houston [1st Dist.] 1995), *reh. denied en banc*, 937 S.W.2d 121 (1996), pet. ref'd.); *Vera v. State*, 836 S.W.2d 344, 347 (Tex.Ct.App.-Amarillo 1992, no pet.)

A defendant need not establish a prima facie case for a single cognizable ground raised in the motion for new trial. It is enough that reasonable grounds for relief which are not determinable from the record need be asserted. *Jordan v. State*, 883 S.W.2d 664, 665 (Tex.Crim.App. 1994); *Bruno v. State*, *supra*. Jury misconduct is one of several

reasons on which a motion for new trial may be granted. Rule 21.3(f) & (g) Texas Rules of Appellate Procedure. An allegation of juror misconduct must be supported by an affidavit of a juror or someone with sufficient knowledge indicating that juror misconduct has occurred. *Brown v. State*, 804 S.W.2d 566, 569 (Tex.Ct.App.-Houston [14th Dist.] 1991, pet. ref'd.) The affidavit must demonstrate that reasonable grounds exist for believing that jury misconduct occurred. *McIntire v. State*, 698 S.W.2d 652, 658 (Tex.Crim.App.1985); *Vera v. State*, 868 S.W.2d 433, 435 (Tex.Ct.App.-San Antonio 1994, no pet.)

IV.

Application of law to unique facts

Aside from the selected examples illustrated in the persuasive authority cited above, there can be no serious argument that the use of the Christian Bible among all jurors during the penalty deliberations in a capital murder prosecution constitutes as an "outside influence" being brought to bear on the jury. It certainly meets the threshold test enunciated in both the *Ford* and *Sanchez* cases: use of the Bible as a code of law and conduct which originates from a source *other* than the jurors and which operates as a force *external* to the jury, the court's charge and the jury's deliberations.

Logic dictates that as long as newspaper articles, media reports, a Reader's Digest publication, a dictionary or an almanac are

considered "outside influences" or "extraneous materials" whose use are prohibited during jury deliberations, this prohibition applies with the same or greater force to the use of and reference to the Christian Bible. This makes sense given the special reverence and authority the vast majority of typical Texas jurors afford the Bible as compared to other codes of law or conduct in force.

The juror affidavit filed with Defendant's motion for new trial establishes four crucial facts: that the jury foreman shared with all members of the jury biblical scripture during the punishment deliberations; that at the time that the scripture was read, punishment deliberations were ongoing and that there was no unanimity among the jury on the special issues; that the biblical passage read by the foreman to the jury dealt with a Christian's duty to obey the laws of man and that civil authority over man is appointed by God; and that the jury answered the special issues in such a way that the trial court was required to impose the death penalty against Defendant and that these answers to the special issues were reached and agreed upon by unanimous vote among the twelve jurors *after* the reading of the biblical scripture. This provides reasonable grounds for relief which are not determinable from the existing record. As such, Defendant is clearly entitled to a hearing by which he may develop the circumstances of the Bible reading and the exact content of the biblical verse read by the foreman to the entire jury. Since the motion for new trial has been timely filed and the juror affidavit is sufficient, Defendant's right to a hearing is mandatory. *accord:*

Reyes v State, 849 S.W.2d at 816; *Vera v. State*, 836 S.W.2d at 347-48 (holding that in the face of a timely filed motion for new trial with sufficient affidavit, a trial court which denies the accused his only opportunity to make a record on juror misconduct allegations abdicates its fact finding function and denies the accused meaningful appellate review, citing to *McIntire v. State*, 698 S.W.2d at 660.)

Yet there is another compelling reason why Defendant is entitled to a hearing on his motion for new trial. As can be gleaned from the two attached exhibits, undersigned counsel has attempted to secure additional information material to the ground of relief raised within the motion for new trial. As long as key jurors refuse to discuss the matter with counsel or with any representative of counsel, then Defendant is deprived of his need and obligation to develop the record upon which he carries the burden of persuasion, namely establishing that the content of the biblical verse read by the foreman to the jurors was adverse to the Defendant. Only through compulsory process and sworn testimony from key jurors at a hearing can all relevant facts be developed for this Court's ultimate determination of the merits underlying Defendant's motion.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that upon consideration of this Memorandum of Law and attached exhibits, together with the Motion For New Trial with attached affidavit and his Amended Motion For New Trial, this Court grant Defendant's formal request for an evidentiary hearing on the allegations of juror

misconduct raised within said motion and hold said hearing prior to August 9, 2005.

Respectfully submitted,

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/s/ Warren L. Clark
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SBN 04300500

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion For New Trial was provided to the office of the Potter Count D.A.'s Office on this the 14 day of July, 2005.

/s/ Warren L. Clark
Warren L. Clark

AFFIDAVIT

BEFORE ME, the undersigned authority, personally appeared Warren L. Clark, who, upon his oath, did state the following:

My name is Warren L. Clark. I am duly employed as an attorney in the State of Texas

and am licensed to practice in all of her county, district and appellate courts. I was appointed by the 251st District Court on May 27, 2005 to prosecute the appeal in *State of Texas v. Jimmie Urbano Lucero*, No. 48,593-C in the 251st District Court, Potter County, Texas in which Defendant Jimmie Lucero was assessed the death penalty.

Upon appointment, I began to contact jurors on the case and hold interviews with as many as possible. In compliance with the Order Sealing Records entered in this cause on July 7, 2005, I will refer to certain jurors by number only. For example, Juror No. 1 will necessarily mean that juror who was the first selected during the voir dire process, Juror No. 2 being the second selected and so on.

My first interviews were with Jurors Nos. 3, 4, 5, 6 and 7. Aiding me in the interview process was and is Attorney Max Peck who served as second chair trial attorney for Defendant Lucero. I requested that Attorney Peck contact Juror Nos. 11 and 12. I also attempted to contact Juror Nos. 1 and 8. Juror No. 8 failed to respond to my invitation to discuss the case. Juror No. 1 refused, through his wife as intermediary, to discuss the case with me. During my extended interview of Juror No. 6, I learned that the jury foreman, Juror No. 2, had read biblical scripture to the jury as a whole and that this reading occurred at a time when the jury had

not yet reached a final, unanimous decision. I called one or two other jurors with whom I had already talked to in order to confirm this fact. I also attempted to determine the content of the recited verse. After having confirmed from other jurors that the Bible reading had occurred, I personally contacted the jury foreman, Juror No. 2, over the phone and conducted a forty-minute interview with him. He confirmed the fact of the Bible reading, the timing of the reading and the content of the verse actually read. He also confirmed that at the time of the Bible reading, the jury was divided 10-2, meaning that there were 10 jurors in favor of answering the special issues in a manner which mandated imposition of the death penalty and two who were not. He identified those two jurors as Juror Nos. 1 and 3. After my conversation with the jury foreman, I corresponded with Juror No. 1 who previously had refused to talk with me about his service. This letter is marked as Exhibit No. 2 and attached hereto. I believed it critical to my duty to perfect the record and insure that Defendant Lucero be afforded an evidentiary hearing on this issue that I attempt to persuade Juror No. 1 to discuss his jury service with me. This was the reason behind the June 22nd letter. Juror No. 1 never responded to my letter nor have I ever been afforded the opportunity to talk personally with him about his jury service or any of the facts outlined in the affidavit of Juror No. 7.

After Attorney Peck indicated that Juror No. 12 had failed to return any of his phone calls requesting an interview, I personally called Juror No. 12 and left a voicemail at his number. I identified myself, my purpose for calling and provided him my cell and office number, much as I had with Juror No. 8, suggesting that he was free to call me back at any time so that I could meet and talk with him about his jury duty. To date, Juror No. 12 has never responded to my request nor has he ever called Attorney Peck back.

Signed this the 13th day of July, 2005.

/s/ Warren L. Clark

SUBSCRIBED TO AND SWORN BEFORE ME, the undersigned authority on this the 13th of July, 2005.

/s/ J. Lynda Smith
Notary Public in and for
The State of Texas

Appendix F

No. 48,593-C

THE STATE OF TEXAS	§	IN THE 251st
	§	DISTRICT COURT
v.	§	
	§	IN AND FOR
	§	
	§	POTTER COUNTY,
JIMMIE URBANO LUCERO	§	TEXAS

Legal Brief in Support of the State's Response to the Defendant's New Trial Motion

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, THE STATE OF TEXAS, in the above entitled and numbered cause, by and through Randall Sims, the 47th District Attorney, and files its Legal Brief in Support of the State's Response to Defendant's New Trial Motion. This brief was requested by the trial court by letter of June 30, 2005. In support thereof, the State would show the Court as follows:

Issue and the Summary of the State's Position

This Court has asked whether the affidavit of juror W___ W___ attached to defendant's Motion for New Trial is sufficient to require an evidentiary new trial hearing. The answer is that the affidavit and motion are inadequate to require a new trial

evidentiary hearing. This is because Texas Rule of Evidence 606(b) prohibits admission of those matters mentioned in W___ W___'s affidavit and the scripture reading was not an "outside influence" as it originated inside the jury deliberation room among the jurors themselves. In a closely analogous case involving Texas Rule of Evidence 606(b), ***Tinker v. State***, 148 S.W.3d 666, 673 (Tex.App.--Houston [14 Dist.] 2004, no pet.), the Court determined that the new trial motion could be overruled without a hearing. Consequently, the affidavit of W___ W____ is inadmissible and insufficient as a matter of law to mandate a new trial hearing.

In reaching this position and because this is a death penalty case where several additional legal proceedings will occur, it is necessary for the State to (1) review the new trial evidentiary hearing requirements; (3) survey the case law on Rule 606(b)'s applicability and constitutionality; (3) review Texas civil and criminal legal determinations on the "outside influence" exception to Rule 606(b); (4) distinguish the authority referenced in the defendant's Memorandum of Law in Support of Request for Evidentiary Hearing; and (5) review Texas and other state court decisions on Bible reading.

The Facts

Juror W___ W___ gave an affidavit about matters discussed during deliberations in the jury room by the jury foreman. In the defendant's new trial motion, there was a suggestion or inference based upon Juror W___ W___'s affidavit that two

jurors changed their votes based upon the reading of scripture from the Bible. W___ W___'s affidavit shows matters occurring during the jury's deliberations, affecting the mind or emotions or mental processes of the jurors, and suggesting an influence on two jurors' assent to the verdict. The matters discussed in her affidavit were matters that originated inside the jury deliberation room among the jurors themselves. Since that time, Juror W___ W___ has given a full explanation in a subsequent affidavit and the State has now obtained affidavits from the other 11 jurors. Juror W___ W___'s new affidavit states that she does not believe there was a connection between the Bible reading and the death penalty votes.

All jurors have signed affidavits for the State concerning the reading of the Bible during the punishment deliberations. Eleven jurors agree that there was no Bible passage read suggesting that a murderer should be executed under Biblical law. There was no Bible passage read about the principle of a fracture for a fracture, a limb for a limb, an eye for an eye, or a tooth for a tooth. There was no discussion that such Biblical principles should be considered or applied in this case against the Defendant, Jimmie Urbano Lucero. There was no suggestion that the scripture content was to convince any juror to vote in a way that would result in the death penalty. The other juror does not recall what scripture was read.

All twelve jurors agree that there was no suggestion that the Bible had the answer on the

questions regarding whether a life sentence or a death sentence should be imposed. There was no suggestion that the Bible should be consulted as the legal authority contradicting the law given in the court's instructions. There was no suggestion that the Bible should be consulted on factual issues as opposed to the evidence presented at the trial. Each juror's punishment decisions were based upon Texas law and evidence presented at trial not the Bible or the content of the scripture read to the jury.

All jurors agree that the scripture content or reading of the scripture did not violate any right of the defendant. The scripture reading was not utilized in a way to bring prejudice against the defendant. There was no harm to the defendant caused by the reading of the scripture or its content. On the dates the affidavits were signed, each juror was still comfortable with his or her individual decisions and votes in this case. They agree that the defendant received a fair and impartial trial.

The jurors who changed their votes unequivocally state that the reading of the scripture and its content had no effect on their votes on the issues presented to the jury.

Texas Rule of Evidence 606(b)

Texas Rule of Evidence 606(b) provides: "**(b) Inquiry Into Validity of Verdict or Indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the jury's deliberations, or to the effect of anything on any

juror's mind or emotions or mental processes, as influencing any juror's assent to or dissent from the verdict or indictment. Nor may a juror's affidavit or any statement by a juror concerning any matter about which the juror would be precluded from testifying be admitted in evidence for any of these purposes. However, a juror may testify: (1) whether any outside influence was improperly brought to bear upon any juror; or (2) to rebut a claim that the juror was not qualified to serve."

Texas Courts Should Review State Civil Decisions

In the criminal context, although the case law has not clearly identified what constitutes an "outside influence" under Texas Rule of Evidence 606(b), it has rejected certain conduct as constituting outside influence. ***Graham v. State***, 2004 WL 813297, 2 Tex.App.--Texarkana,2004)(not designated for publication, Tex. R. App. P. 47.7); ***State v. Reid***, 2001 WL 1515843, 3(Tex.App.--El Paso,2001)(not designated for publication, Tex. R. App. P. 47.7); ***Hines v. State***, 3 S.W.3d 618, 623 (Tex.App.--Texarkana 1999, pet. ref'd). A number of the courts determining criminal cases have looked to the civil cases in determining whether any "outside influence" was brought to bear on a juror during deliberations. ***Tinker v. State***, 148 S.W.3d 666, 673 (Tex.App.--Houston [14 Dist.] 2004, no pet.); ***Franks v. State***, 90 S.W.3d 771, 799 -800 (Tex.App.--Fort Worth 2002, *pet. for discretionary review denied due to late filing*, 97 S.W.3d 584, Tex.Cr.App. 2003); *See* ***In re S.P.***, 9 S.W.3d 304, 308 (Tex.App.--San Antonio 1999, no pet.); **Hines v. State**, 3 S.W.3d at 622-23. In addition to those mentioned above, several other criminal

cases have reviewed the civil cases in interpreting the other Texas rules of evidence. ***Moon v. State***, 44 S.W.3d 589, 596 (Tex. App.--Fort Worth 2001, pet. ref'd); **Sparks v. State**, 943 S.W.2d 513, 515 -516 (Tex. App.--Fort Worth 1997, pet. ref'd); **Rodriguez v. State**, 926 S.W.2d 379, 382 (Tex. App.--San Antonio 1996, no pet.). So, it is logical to examine Texas civil law in determining this new trial motion.

In this regard, the Court of Criminal Appeals has determined that since the Texas Rules of (then, Civil and Criminal) Evidence were patterned after the Federal Rules of Evidence, cases interpreting federal rules should be consulted for guidance unless the Texas rule clearly departs from its federal counterpart. ***Cole v. State***, 839 S.W.2d 798, 801 (Tex.Cr.App.1990). Texas Rule of Evidence 606(b) permits a juror to testify about whether an "outside influence" was "improperly brought to bear on a juror." However, Federal Rule 606(b) contains an additional exception that permits a juror to testify as to whether extraneous prejudicial information was brought to the jury's attention. 2A Texas Practice Series Rule 606, Handbook on the Texas Rules of Evidence (2005). Consequently, since federal rule 606(b) is substantially different than the Texas evidentiary rule, its interpretation will not be reviewed.

The Texas Supreme Court on Rule of Evidence 606(b)

In 2000, the Texas Supreme Court examined a number of policy issues and considerations over several pages with regard to re-opening a jury's

verdict under Texas Rule of Evidence 606(b). ***Golden Eagle Archery, Inc. v. Jackson***, 24 S.W.3d 362, 366-375 (Tex. 2000). In that opinion, the Court determined that the federal rule differs from the Texas rule because the Texas provision deletes the federal exception that permits a juror to testify "whether extraneous prejudicial information was improperly brought to the jury's attention." *Id.* Acknowledging that it had not defined what "outside influences" were, the Texas Supreme Court also stated:

> Most Texas courts considering the question have held that the rules prevent a juror from testifying that the jury discussed improper matters during deliberation. *See, e.g., Soliz v. Saenz*, 779 S.W.2d 929, 933 (Tex.App.--Corpus Christi 1989, writ denied); *King v. Bauer*, 767 S.W.2d 197, 198 (Tex.App.--Corpus Christi 1989, writ denied); *Baley v. W/W Interests, Inc.*, 754 S.W.2d 313, 316 (Tex.App.--Houston [14th Dist.] 1988, writ denied); *Robinson Elec. Supply Co. v. Cadillac Cable Corp.*, 706 S.W.2d 130, 132 (Tex.App.--Houston [14th Dist.] 1986, writ ref'd n.r.e.); *Clancy v. Zale Corp.*, 705 S.W.2d 820, 828-29 (Tex.App.--Dallas 1986, writ ref'd n.r.e.). We agree. The rules contemplate that an "outside influence" originates from sources other than the jurors themselves.

The Texas Supreme Court further determined that Texas Rule of Evidence 606(b) did not violate the State Constitution's due process provision. ***Golden Eagle Archery, Inc. v. Jackson***, 24 S.W.3d at 374-75. Referencing ***Tanner v. United States***, 483 U.S. 107, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987), the Texas Supreme Court reiterated that (1) there were substantial common-law policy considerations against juror impeachment of verdicts in general, (2) potential jurors may be tested on voir dire, (3) jurors could report wrongful behavior before the verdict is reached and corrective action could be taken at that juncture, (4) verdicts can be confirmed or attacked by polling a jury, and (5) verdicts may be impeached by non-juror post judgment evidence. Consequently, the Texas Supreme Court, following the United States Supreme Court's determinations, concluded that Texas Rule of Evidence 606(b) does not violate the State Constitution's due process provisions and did not deprive the litigant of a fair trial. ***Golden Eagle Archery, Inc. v. Jackson***, 24 S.W.3d at 375.

Texas Cases on Rule of Evidence 606(6): What is not an "Outside Influence?"

In Texas civil cases, it has been stated that to constitute "outside influence," the influence must emanate from outside the jury and its deliberations. ***Blackmon v. Mixson,*** 755 S.W.2d 179, 183 (Tex.App.--Dallas 1988, no writ). This same interpretation was also referenced and applied in a recent criminal case. ***Franks v. State***, 90 S.W.3d at 799-800; *see also* ***Garcia v. State***, 2004 WL 1895184, 7 (Tex.App.--El Paso 2004, pet. ref'd)(not designated for publication, Tex. R. App. P. 47.7). In the civil and criminal

contexts, to constitute "outside influence," the "source of the information must be one who is outside the jury, i.e., a non-juror, who introduces the information to affect the jury's verdict." ***Soliz v. Saenz***, 779 S.W.2d at 932; ***Baley v. W/W Interests, Inc.***, 754 S.W.2d 313, 316 (Tex.App.--Houston [14th Dist.] 1988, writ denied). Information gathered by a juror and introduced to the other jurors by that juror, even if the information was introduced specifically to prejudice the vote, does not add up to outside influence. ***Soliz v. Saenz***, 779 S.W.2d at 932; ***Baley v. W/W Interests, Inc.***, 754 S.W.2d at 316.

A review of Texas cases stating what specific facts do not constitute an "outside influence" under Rule of Evidence 606(b) is necessary. A discussion of newspaper articles is not considered an outside influence. ***Baley v. W/W Interests, Inc.***, 754 S.W.2d at 315. A juror's copying of a dictionary definition from a dictionary and sharing it with other jurors does not constitute an "outside influence." ***Cooper Tire & Rubber Co. v. Mendez***, 155 S.W.3d 382, 413 (Tex.App.--El Paso 2004, pet'n for review filed); ***Perry v. Safeco Ins.*** Co., 821 S.W.2d 279, 281 (Tex.App.--Houston [1st Dist.] 1991, writ denied), *disapproved on other grounds by* ***Golden Eagle Archery, Inc. v. Jackson***, 24 S.W.3d at 362 (Tex. 2000) (magazine article discussion too). A juror's injection of his own personal expertise, experience, or knowledge does not satisfy the "outside influence" requirement. This is because such influence is said to start and flow inside the jury. ***Soliz v. Saenz***, 779 S.W.2d at 932; *see also* ***In re S.P.***, 9 S.W.3d at 309; ***Franks v. State***, 90 S.W.3d at 799-800. A discussion of insurance

coverage is not an outside influence. ***Moon v. Firestone Tire & Rubber Co.***, 742 S.W.2d 792, 793 (Tex.App.--Houston [14th Dist.] 1987, writ denied). Discussion of individuals similarly situated is not considered an outside influence. ***Marriage of Yarbrough***, 719 S.W.2d 412, 416 (Tex.App.--Amarillo 1986, no writ). Nor does vigorous, pushy influence of one juror upon the rest of the panel constitute "outside influence." ***Perry v. Safeco Ins. Co.***, 821 S.W.2d at 281.

There are other Texas cases in this vein. ***Crowson v. Kansas City Southern Railway Co.***, 11 S.W.3d 300, 304-05 (Tex.App.--Eastland 1999, no pet.) (textbook formula for discounting cash flows to discount value of plaintiff's lost future wages held not an outside influence); ***Wooten v. Southern Pac. Transp. Co.***, 928 S.W.2d 76, 78-79 (Tex.App.--Houston [14th Dist.] 1995, no writ) (in a suit alleging failure to maintain safe railroad crossing, juror's statement that, based on his past experiences and observations, railroad intersection was safe held not an outside influence).

Two jurors who visited the scene of the occurrence giving rise to the suit and told the other jurors their experiences and knowledge which they acquired was not an "outside influence." ***Baley v. W/W Interests, Inc.***, 754 S.W.2d at 316. However, now, if a juror visited the occurrence scene during the trial and before jury deliberations began, Rule 606(b) would not preclude a juror from testifying about the improper visit at a new trial motion. *See*

Golden Eagle Archery, Inc. v. Jackson, 24 S.W.3d at 370.

The Defendant's Referenced Rule 606(b) Cases Are Inapplicable

The State needs to address cases the defendant references in support of his new trial motion. The defendant in the new trial motion references a number of out-of-state cases concluding that books and magazines are "outside influences." Texas cases do not follow the "outside influence's interpretations of other sister state courts and some of these decisions may have been based upon a rule similar to federal evidence rule 606(b).

The State will now address referenced Texas cases. In one case, the Court, without citation to any authority and in dicta, stated that "[m]edia coverage about appellant constitutes an outside influence, and Rule 606(b) thus permits a juror to testify about such." ***Drew v. State***, 76 S.W.3d 436, 460 (Tex.App.--Houston [14 Dist.] 2002, pet ref'd). The statement was not necessary to the court's resolution because there was no affidavit attached to the motion for new trial showing that media coverage was discussed. The defendant also references ***Carroll v. State***, 990 S.W.2d 761, 762 (Tex.App.-Houston [141 Dist.] 2002, pet. ref'd) and ***Knorpp v. State***, 645 S.W2d 892, (Tex. App.–El Paso 1983, no pet.). These cases are distinguishable because they do not discuss Texas Rule of Evidence 606(b) and determined whether harmful new or other evidence was admitted before the jury as opposed to whether there was an "outside influence."

Texas Bible Reading Cases

In a statutory rape case, it was determined that the reading of the Bible by the jury during deliberations was not reversible error. ***Martin v. State***, 400 S.W.2d 919, 921 (Tex.Cr.App.), *cert. denied*, 385 U.S. 961, 87 S.Ct. 399, 17 L.Ed.2d 306 (1966). In a rape by force case where the death penalty was assessed, there was no reversible error even if one of the jurors quoted scripture from the Bible to other jurors. ***Branch v. State***, 447 S.W.2d 932,933 (Tex.Cr.App. 1969).

Other States on Bible Reading in Death Penalty Cases

Other sister state courts have decided similar issues. In a death penalty case decided by the Supreme Court of Indiana, there was no prejudice where juror evidence showed that Bible was not consulted as an extra-legal source of authority during deliberations. ***Bieghler v. State***, 690 N.E.2d 188, 203 (Ind. Sup. Ct. 1997). There, although the Bible was discussed in conjunction with the propriety of the death penalty at the guilt stage, the trial court found that the juror's testimony "establish[ed] that 'conscientious people' who are faced with a life and death decision resort to their religious scruples in making such decision[s]." ***Id.*** And, the Court concluded that such "deep introspection neither violate[s] principles of justice nor prejudices the defendant." ***Id.***

In a death penalty case decided by the Supreme Court of Georgia, defense counsel based his

argument to the jury that the death penalty should not be given, by tracing the history of the Bible from a surrounding in which the death penalty was imposed for such things as witchcraft and false prophesy, to a new milieu of forgiveness and mercy. ***Jones v. Francis***, 252 Ga. 60, 312 S.E.2d 300, 303 (Ga.1984). There, the Court concluded that the defendant was not harmed by the argument or the Bible going into the room with the jury. *Id.* The Court concluded it was unlike the situation where there was an "extraneous influence" on the jury. *Id.*

In a death penalty case out of Alabama, the Court determined that "[t]here was no prejudice where selections from Psalm 121, ("my help cometh from the Lord," and Luke, ("[j]udge not and ye shall not be judged ... forgive and ye shall be forgiven," were "intended to encourage, and had the effect of encouraging, the jurors to take their obligation seriously and decide the question ... based only on the evidence presented from the witness stand in open court."). ***McNair v. State***, 706 So.2d 828, 835-838 (Ala.Cr.App. 1997). In that case, there was no evidence to support the slightest inference that the prayers and Bible readings were prejudicial or that they might have unlawfully affected the verdict. So, the Court concluded, after reviewing the evidence, that reading from the Bible and praying in the jury room during deliberations, was not of such a character or nature as to indicate bias or corruption or misconduct that might have affected the verdict. *Id.*

In a death penalty case out of California, one juror read Romans 13:1-5. Also read was Numbers, chapter 35, verse 21: "Or if he struck him down with his hand in enmity and as a result he died, the one who struck him down shall surely be put to death" and Numbers, chapter 35, verse 16: "But if he struck him down with an iron object, so that he died, he is a murderer; the murderer shall be put to death." ***People v. Mincey***, 2 Cal.4th 408, 6 Cal.Rptr.2d 822, 827 P.2d 388, 425 (Cal. 1992). During the jury deliberations and after the trial judge learned these facts, the court admonished the jury to not consider the Bible or other materials and to decide the case on the law of the State of California and the facts presented at trial. Further, each juror stated that their verdict was not influenced by the scripture's content. The California Court determined there was no reversible error.

The Kansas Supreme Court has stated that, if a biblical passage given to a juror in a death penalty case was not shown to have affected the juror's decision, there was no reversible error. ***State v. Kleypus***, 272 Kan 894, 968-970, 40 P.3d 139,204-205 (Kan. Sup. Ct. 2001).

Rule 606(b) does not violate the Federal Constitution

The United States Supreme Court in ***Tanner v. United States,*** *supra,* concluded that Fed. Rule of Evidence 606(b) did not violate the Sixth Amendment's due process provision.

Distinguishing Defendant's Referenced Bible Reading Case Law

In his Memorandum of Law on page 3 of his brief, the defendant states that the Colorado Supreme Court found that the reading of Leviticus and Romans during deliberations constituted "'extraneous information' barred by appropriate state statutory and constitutional provisions." A further explanation is necessary. First, Colorado Evidence Rule 606(b) permits the admission of juror testimony on whether "extraneous prejudicial information was improperly brought to the jurors' attention." ***People v. Harlan***, 109 P.3d 616, 624 (Colo. Sup. Ct. 2005). Texas Rule of Evidence 606(b) does not possess this language relied upon in the Colorado case. The relevant Colorado question for determining prejudice is "whether there is a reasonable possibility that the extraneous information influenced the verdict to the detriment of the defendant; if so, the verdict must be reversed." ***People v. Harlan***, 109 P.3d at 625. So, the legal basis of the admission of juror testimony in Colorado is not persuasive authority in this Texas case, State v. Jimmie Lucero. A second distinction is several Colorado jurors consulted the Bible's provisions relating to capital punishment. Third, the extraneous materials contained a passage mandating the death penalty for murders and civil obedience to authorities. Fourth, the Colorado trial court made findings that there was a reasonable possibility that the use of the Bible in the jury room to demonstrate a requirement of the death penalty for the crime of murder would have influenced a typical juror to reject a life sentence for the capital defendant. ***People v Harlan***, 109 P.3d at 623.

Moreover, although Romans 13:1-6 was read in the State v. Jimmie Lucero jury deliberations, it was not considered with other Biblical death penalty mandates. Consequently, the submission to "authority" portion of the scripture would be the law of Texas as provided in the trial court's instructions as opposed to Biblical law or the position expressed by the prosecution as mere advocates in the justice system.

On page 4 of the defendant's Memorandum of Law, the defendant references ***May v. Kemp***, 706 F.Supp. 1534, 1558-59 (N.D. Ga. 1989) for the proposition that Bible reading "during jury deliberations in a state capital murder trial permitted the jury to decide issues with a aid of a 'specific, extra-judicial code of conduct' which ultimately influenced the jury's deliberations in an unconstitutional manner." However, the referenced case is bottomed on the ground that "it was constitutional error for the **[trial] court to [knowingly] permit the Christian Bible** to go into the jury room **at the request of the jurors apparently for consultation** in connection with their deliberations." [Emphasis added.] ***Id.*** at 1560. The case was also apparently decided on the extraneous prejudicial information clause of evidence rule 606(b) similar to the federal rule, ***id.*** at 1558 & 156. That clause is not contained in the Texas rule.

At page 3 and 4 of his Memorandum of Law, the defendant references ***Glossip v. State***, 29 P.3d 597, 604-05 (Okla. Crim. 2001) for the proposition

that it was "concluded that jurors' reading and reference to the Bible 'and its verses' during [death penalty] deliberations 'constituted receipt of extraneous material and an improper influence on the jury deliberations." However, this case was reversed on other grounds and any statements regarding Bible reading were cautionary according to the opinion and unnecessary to the resolution of the case. *Id.* at 603 & 605. The case was also apparently decided on the extraneous prejudicial information clause of evidence rule 606(b) similar to the federal rule. *Id.* at 605. Again, that provision is not contained in Texas evidence rule 606(b).

Law – General Law on Requirement for New Trial Hearing

In *Wallace v. State*, 106 S.W.3d 103, 108 (Tex.Cr.App. 2003), the Court of Criminal Appeals stated:

> A defendant is entitled *to a hearing* on his motion for new trial if the motion and accompanying affidavit(s) "rais[e] matters not determinable from the record, upon which the accused could be entitled to relief." *Reyes v. State*, 849 S.W.2d 812, 816 (Tex.Crim.App.1993). To be sufficient to entitle the defendant to a hearing, the motion for new trial and accompanying affidavit(s) "need not establish a prima facie case" for a new trial. *Jordan v. State,* 883 S.W.2d 664, 665 (Tex.Crim.App.1994). Rather, they "must merely reflect that reasonable grounds exist for holding that such relief could be granted."

> *Martinez v. State*, 74 S.W.3d 19, 22 (Tex.Crim.App. 2002). The purpose of the hearing is to give the defendant an opportunity to fully develop the matters raised in his motion. *Id.* at 21. If the trial court denies a hearing on the motion for new trial and the defendant appeals from that denial, the appellate court must review the trial court's decision for abuse of discretion. *Id.* at 22.

Law–A Defendant's New Trial Motion and Attached Affidavit(s) Are Insufficient If They Do Not Show "outside influence." In That Event, No New Trial Hearing Is Required.

Rule 606(b) prohibits jurors from testifying as to matters or statements that occurred during formal jury deliberations or as to the mental processes of any juror. The exception in former Criminal Rule 606(b), which allowed jurors to testify as to any matter relevant to the validity of the verdict, has been repealed by new Rule 606(b). *Hicks v. State*, 15 S.W.3d at 630; *Hines v. State*, 3 S.W.3d at 621. Rule 606(b) further renders inadmissible in such an inquiry "a juror's affidavit or any statement by a juror concerning any matter about which the juror would be precluded from testifying."

In a case closely analogous to the instant case, *Tinker v. State*, 148 S.W.3d 666, 673 (Tex.App.–Houston [14 Dist.] 2004, no pet.), (1) appellant attached an affidavit from one of the jurors in support of his motion for new trial; (2) the affidavit described how the jury reached a verdict of guilty

during deliberations for reasons other than guilt; (3) no other affidavits were used to support the motion; and (4) the State moved to quash the juror's affidavit under Texas Rule of Evidence 606(b). There, the trial court quashed the affidavit and denied the motion for new trial without a hearing. After reviewing the juror's affidavit, that appellate court determined that the affidavit addressed only matters which the juror learned during jury deliberations and clearly came from the other jurors and, as such, did not constitute an outside influence. *Id.* Consequently, a juror's affidavit that described matters that did not constitute outside influence could not be used to support the motion for new trial based on jury misconduct. *Id.*

Application of Fact to the Law

Here, the defense affidavit of W___ W___ attached to Defendant's Motion for New Trial establishes that no "outside influence" was improperly brought to bear upon any juror. It merely stated that the Bible was read during the deliberations by the foreperson and later two jurors changed their preliminary votes. The referenced events by W___ W___ originated inside the jury room among the jurors themselves and, as a result, there are no reasonable grounds for holding that new trial relief could be granted.

The State in its Response to the New Trial Motion and its Original Motion to Quash has objected to the defense affidavit of W___ W___ and sought its quashal. The defense affidavit of W___ W___ is insufficient as a matter of law under Texas

Rule of Evidence 606(b) because it contains statements occurring during the jury deliberations and shows that there was no "outside influence." The Bible Reading is the same a reading a magazine, a dictionary, or other book in the jury room. Under these circumstances, this Court is not required to hold a new trial hearing. ***Tanker v. State***, 148 S.W.3d at 673.

Attorney Clark has also filed an affidavit and attached it to the Memorandum of Law in Support of Request for Evidentiary Hearing. The State has objected to those portions of Clark's affidavit that report what other juror(s) have stated to him because they constitute inadmissible hearsay. When all hearsay portions of the affidavit are excluded, there is nothing left that would show matters outside the jury deliberations or an "outside influence." Even if those portions of Clark's affidavit were admissible against a hearsay objection, they are matters occurring during deliberations and do not constitute an "outside influence" and, as a result, no new trial hearing is required by law. The affidavit does not show reasonable grounds for believing that new trial relief could be granted.

Without waiving any of the above and accompanying arguments and objections, the State has obtained affidavits from all jurors, including a new one from W___ W___, who has now given a more detailed explanation. They all allege (1) there was no suggestion that the Bible had the answer on those questions regarding whether a life sentence or a death sentence should be imposed; (2) there was no

suggestion that the Bible should be consulted as the legal authority contradicting the law in the court's instructions; (3) there was no suggestion that the Bible should be consulted on factual issues as opposed to the evidence presented at the trial; (4) the jury's punishment decisions were based upon law of the State of Texas and evidence presented at trial not the Bible or the content of the scripture read to the jury; (5) the scripture content or reading of the scripture did not violate any right of the defendant; (6) the scripture reading was not utilized in a way to bring prejudice against the defendant; (7) there was no harm to the defendant caused by the reading of the scripture or its content; (8) the defendant received a fair and impartial trial; (9) all jurors were comfortable with their individual decisions and votes in this case; and (10) the jurors who changed their votes unequivocally state that the reading of the scripture and its content had no effect on their votes on the issues presented to the jury. Even so, the affidavits obtained by the State were an attempt to controvert any claim on any legal theory that somehow the reading a scripture from the Bible was wrongful or harmed the defendant.

The State, in an abundance caution and because this is a death penalty case, obtained these affidavits. Specifically, the State was concerned that (1) the serving jurors could forget what happened during the deliberations; (2) jurors could die; (3) jurors could become disabled; (4) the interpretation of rules regarding "outside influence" could be changed at a future date and the affidavits become admissible; (5) new case or statutory law

permitting legal theory might arise or be asserted in the future; and (6) judges might have some concern in a death penalty case about whether jurors considered the Biblical law as an extra judicial code above the laws of Texas or the jury ignored the facts. So, the State has obtained the controverting affidavits to lay to rest forever this issue. Although the State has obtained these affidavits, they are still inadmissible under current Texas law because they do not establish any "outside influence" that affected any juror's decision.

Respectfully submitted,
Randal Sims, 47th District Attorney

/s/ Mark Baskett
MARK BASKETT
Date: July 25, 2005
47th Assistant District Attorney
Potter County Courts Building
501 S. Fillmore, Suite 5A
Amarillo, Texas 79101
(806) 379-2325;
Fax (806) 379-2823
SBN 01870600

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing instrument was served upon the following attorney(s) of record in the above-referenced cause, as shown below on or before the 27th day of July, 2005.

Via:

☑ U.S. Regular Mail, Postage Prepaid

☐ Hand Delivery

☐ Certified Mail RRR # _____

☐ Facsimile 371-9610

Warren Clark
P.O. Box 2408
Amarillo, Texas 79105

/s/ Mark Baskett
Mark Baskett

No. 48,593-C

THE STATE OF TEXAS	§	IN THE 251st DISTRICT COURT
v.	§	
	§	IN AND FOR
	§	
JIMMIE URBANO LUCERO	§	POTTER COUNTY, TEXAS

The State's Original Response to Defendant's Amended Motion For New Trial and The State's Original Motion to Quash the Affidavits Filed in Support of Defendant's New Trial Motion

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, THE STATE OF TEXAS, in the above entitled and numbered cause, by and through Randall Sims, the 47th District Attorney, and makes its response to Defendant's Amended Motion for New Trial. The State also files its Original Motion to Quash the Affidavit(s) Filed in Support of the Defendant's New Trial Motion. In support thereof, the State would show the following.

I.

The State objects under Texas Rule of Evidence 606(b) to any evidence regarding all matters in the Affidavit of W___ W___ attached and filed in support of the Defendant's Motion for New Trial. The State objects to any inadmissible evidence under Texas Rule of Evidence 606(b) included in the Affidavit of attorney Warren Clark attached to the defendant's Memorandum of Law. The State also

objects to Clark's affidavit on hearsay grounds as to all those matters that refer to what he was told by any juror. Additionally, the State seeks to quash, these two affidavits.

II.

Texas Rule of Evidence 606(b) provides: "**(b) Inquiry Into Validity of Verdict or Indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the jury's deliberations, or to the effect of anything on any juror's mind or emotions or mental processes, as influencing any juror's assent to or dissent from the verdict or indictment. Nor may a juror's affidavit or any statement by a juror concerning any matter about which the juror would be precluded from testifying be admitted in evidence for any of these purposes. However, a juror may testify: (1) whether any outside influence was improperly brought to bear upon any juror; or (2) to rebut a claim that the juror was not qualified to serve."

III.

Texas Rule of Evidence 606(b) prohibits jurors from testifying as to matters or statements that occurred during formal jury deliberations or as to the mental processes of any juror. The exception in former Criminal Rule 606(b), which allowed jurors to testify as to any matter relevant to the validity of the verdict, has been repealed by new Rule 606(b). ***Hicks v. State***, 15 S.W.3d 626, 630 (Tex.App.--Houston [14th Dist.] 2000, pet. ref'd); ***Hines v. State***, 3 S.W.3d 618, 621 (Tex.App.--Texarkana 1999, pet. ref'd).

IV.

Allegations in a motion for new trial must be proved by competent evidence, which must be received by the court before it can be considered. ***Lincicome v. State***, 3 S.W.3d 644, 646 (Tex.App.-- Amarillo 1999, no pet.). The trial court need not consider inadmissible jury statements presented through a hearsay affidavit. ***Id.*** at 647; ***see also*** Caldwell v. State, 2003 WL 21982148, 6 (Tex.App.-- Houston [14 Dist.] 2003, pet. ref'd)(not designated for publication Tex. R. App. P. 47.7). Rule 606(b) does not preclude the testimony of a non-juror who possesses **personal knowledge** of juror misconduct. ***Golden Eagle Archery, Inc. v. Jackson***, 24 S.W.3d at 369; ***Mayo v. State***, 708 S.W.2d 854 (Tex.Cr.App.1986). The trial court has discretion to sustain the State's objection to a new trial affidavit on hearsay grounds.

V.

In this regard, the State recognizes sometimes trials courts choose to wisely make a full record of factual matters in death penalty cases.

VI.

In the event that the trial court determines that a full evidentiary hearing is required, the State must object to the filed affidavits attached to the defendant's new trial documents and seek quashal. If a new trial hearing is conducted, the State must object to avoid any waiver. The State intends to preserve its error or objection to Texas Rule of Evidence 606(b).

VII.

In the event that the trial court determines that a full evidentiary hearing is required, the State would be compelled to produce at least affidavit evidence to rebut any suggestion that the Bible or scripture reading (1) somehow affected the verdict, (2) denied the defendant due process, (3) denied the defendant any statutory or constitutional right, (4) the jury considered Biblical law, (5) there was an "outside influence," or (6) the jury impermissibly considered the content of the Bible.

VIII.

Specifically, if a full evidentiary hearing is required, the State would be impelled to conditionally present affidavits or live testimony because (1) the serving jurors could forget what happened during the deliberations; (2) jurors could die; (3) jurors could become disabled; (4) the interpretation of rules regarding "outside influence" could be changed at a future date and the affidavits become admissible; (5) new case or statutory law permitting a legal theory might arise or be asserted in the future; and (6) judges might have some concern in a death penalty case about whether jurors considered the Biblical law as an extra judicial code above the laws of Texas or the jury ignored the facts.

IX.

The State's position is that the Defendant should receive one fair and impartial trial. The State's position is that this Defendant has obtained a fair and impartial trial. Although few, if any, contested trials are perfect, the State's position is

that it does not want to act in any way at this juncture or any juncture to cause reversible error.

X.

In an abundance of caution, and without waiving any of the above and foregoing objections, the State has attached affidavits of the jury foreperson and the 11 jurors.

XI.

The State's attached affidavits establish that the scripture reading or scripture was not related to the verdict rendered. The verdict was based upon Texas law in the trial court's written instructions and the evidence presented. The affidavits suggest that the scripture was utilized to comfort juror(s) or to suggest that the court instructions should be followed.

XII.

The courts instructions should have been followed because the jurors are sworn to answer questions presented to them in the court's charge. In passing, the State emphasizes that jurors are sworn to "render a true verdict according to the law and the evidence, so help you God." Texas Code of Criminal Procedure § 35.22.

XIII.

If the trial court determines that the jury should not have read the scripture for any reason, any error in reading the scripture and any brief comment about it should be disregarded. In the

alternative, any error was harmless beyond a reasonable doubt.

XIV.

Initially, the State will file a copy of the affidavits in the District Clerk's file with each of the juror's names blotted out. The State will later present a copy of the original affidavits to the Court with an Ex parte temporary motion and order requesting that the originals be sealed and made a part of the Clerk's record. In attempting not to reveal the identities of the jurors at this juncture, the State will refer to Jurors by sequential numbers in the order in which then were chosen to serve on this jury.

XV.

In Defendant's amended new trial motion, he also asserts that the Texas statutory scheme is unconstitutional on various federal constitutional grounds. The defendant references ***Tennard v. Dretke***, *infra*, for the proposition that the article 37.071 of the Texas Code of Criminal Procedure unconstitutionally narrows the jury's discretion to factors concerning only moral blameworthiness. In that regard, he says the statute "instructs the jury that it may not consider mitigating evidence which it does not find to be sufficiently connected to the crime to reduce moral blameworthiness."

XVI.

This is a pure legal attack and does not require an evidentiary hearing. The argument appears to have been foreclosed by a recent Court of

Criminal Appeals determination. In *Perry v. State*, 158 S.W.3d 438, 449 (Tex.Cr.App. 2004), the Court determined:

> In a supplemental point of error, appellant claims that it offends "the principles underlying [the United States Supreme Court's recent decision in] *Tennard v. Dretke*, [--- U.S. ---, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004)] to instruct a capital sentencing jury to disregard evidence that the jurors do not find to be sufficiently connected to the crime to reduce moral blameworthiness." This Court has decided that the mitigation special issue "does not unconstitutionally narrow the jury's discretion to factors concerning only moral blameworthiness." *See Cantu v. State*, 939 S.W.2d 627, 648-49 (Tex.Cr.App.), *cert. denied*, 522 U.S. 994, 118 S.Ct. 557, 139 L.Ed.2d 399 (1997). The Supreme Court's *Tennard* decision, which was decided under another statutory scheme that did not include the mitigation special issue, does not hold otherwise. *See Tennard*, --- U.S. at ---, 124 S.Ct. at 2569- 72 ("impaired intellectual functioning" is inherently mitigating and, therefore, meets the definition of "constitutionally relevant" mitigating

evidence). The supplemental point of error is overruled.

As such, time trial court should overrule the motion for new trial without a hearing.

CONCLUSION

The State prays that the trial court sustain its objection to the defense affidavits, quash the affidavits, and overrule the defendant's motion for new trial without a hearing. The State further requests any other relief, at law or in equity, to which it may be justly entitled.

Respectfully submitted,
Randal Sims, 47th District Attorney
/s/ Mark Baskett
MARK BASKETT
Date: July 25, 2005
47th Assistant District Attorney
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(806) 379-2325;
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SBN 01870600

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing instrument was served upon the following attorney(s) of record in the

above-referenced cause, as shown below on or before the 27th day of July, 2005.

Via:

☑ U.S. Regular Mail, Postage Prepaid

☐ Hand Delivery

☐ Certified Mail RRR # _____

☐ Facsimile 371-9610

Warren Clark
P.O. Box 2408
Amarillo, Texas 79105

/s/ Mark Baskett
Mark Baskett

No. 48,593-C

THE STATE OF TEXAS	§	IN THE 251st
	§	DISTRICT COURT
v.	§	
	§	IN AND FOR
	§	
JIMMIE URBANO LUCERO	§	POTTER COUNTY,
	§	TEXAS

AFFIDAVIT _____ FOR STATE'S ANSWER TO DEFENDANT'S MOTION FOR NEW TRIAL

STATE OF TEXAS	§
&	§
COUNTY OF POTTER	§

My name is _____ I am over 18 years of age, have never been convicted of a felony, and am fully competent to give this affidavit. I have received nothing of value to make this affidavit. I can read and write the English language. I make this Affidavit without any threat, force, fraud, duress, promise of benefit, inducement, or representation of any kind by any person whomsoever. At the time of making this affidavit, I am completely sane, sober, and capable of understanding the character of my acts and deeds.

I served _____ on the capital murder case, styled "The State of Texas v. Jimmie Urbano Lucero." In making this affidavit, I have reviewed relevant portions of the punishment jury charge given to us by Judge Pirtle, been shown the

Defendant's Motion for New Trial, and reviewed an affidavit signed by _____. These materials were supplied to me by a person in the 47th District Attorney's Office. _____ _____ Judge Pirtle was the judge over the above referenced capital murder case involving Jimmie Urbano Lucero. A certified copy of the punishment jury charge and verdict form in this case is attached to my affidavit as "Exhibit A." The affidavit signed by _____ and the Motion for New Trial are attached to this affidavit as "Exhibit B."

The attached jury charge also provided that:

> In arriving at the answers to the Special Issues submitted, during your deliberations you must not consider, discuss, nor relate any matters not in evidence before you. You should not consider nor mention any personal knowledge or information you may have about any fact or person connected with this case which is not shown by the evidence.
>
> Nor are you to arrive at your answers by lot or by chance; or by any other manner than by a full, fair and free discussion of the evidence bearing thereon.
>
> You, the jury, are the exclusive judges of the credibility of the witnesses, of the weight to be given the evidence and of the facts proved, but you are bound to receive

the law from this Court as given in this charge and be governed thereby.

You are charged that it is only from the witness stand that the jury is permitted to receive evidence regarding the case, or any witness therein, and no juror is permitted to communicate to any other juror anything he or she may have heard regarding the case or any witness therein, from any source other than the witness stand.

After going back into the jury deliberation room during the punishment stage, I read the attached punishment jury charge aloud before deliberations commenced. I followed the court's instructions. The jury was bound to follow the jury instructions given to us by the court. To my knowledge, each juror and the jury, as a whole, complied the court's instructions in this case.

The jury in detail discussed specific facts on the questions submitted to us at the punishment stage. The jury discussed whether there were facts that showed beyond a reasonable doubt that there was a probability that the Defendant, Jimmie Urbano Lucero would commit criminal acts of violence that would constitute a continuing threat to society. We also discussed the facts presented from the witness stand and that took into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant,

and determined whether there was a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

At some juncture before the final vote was taken that lead to the punishment verdict, I read some scripture from the Bible. I believe the scripture reading was early in the punishment deliberations. No scripture was read at the guilt stage deliberations. I read Romans 13:1-6 from the New International Version of Bible, as follows:

Romans 13

Submission to the Authorities

1Everyone must submit himself to the governing authorities, for there is no authority except that which God has established. The authorities that exist have been established by God. 2Consequently, he who rebels against the authority is rebelling against what God has instituted, and those who do so will bring judgment on themselves. 3For rulers hold no terror for those who do right, but for those who do wrong. Do you want to be free from fear of the one in authority? Then do what is right and he will commend you. 4For he is God's servant to do you good. But if you do wrong, be afraid, for he does not bear the sword for nothing. He is God's servant,

an agent of wrath to bring punishment on the wrongdoer. 5Therefore, it is necessary to submit to the authorities, not only because of possible punishment but also because of conscience. 6This is also why you pay taxes, for the authorities are God's servants, who give their full time to governing.

The reading of the Bible took less than 2 minutes out of several hours of deliberations discussing the charged law and the facts. No other scripture was read or discussed. There was no passage read that a murderer should be executed under Biblical law. There was no passage read about the principle of a limb for a limb or an eye for an eye. There was no discussion that such a Biblical principle should be considered or applied in this case to the Defendant, Jimmie Urbano Lucero. After the reading of the scripture, I made a comment to the effect that we needed to follow the laws and those in authority in this case. This comment and the scripture was completely congruent with the trial court's instructions. The entire time spent on the scripture and my comment was probably less than 2 and ½ minutes. I have seen documentation that on May 26, 2005, the jury retired to deliberate at 12:20 p.m. and reached a verdict at 4:58 p.m. These times are in accord with my memory of these events.

The reading of this scripture was not an attempt on my part to convince any juror to vote in a way that would result in the death penalty. I wanted to read scripture because of the seriousness of the

decision at hand and to suggest that the man's law as charged in the judge's instructions should be followed. There was no suggestion that the Bible had the answer on the questions regarding whether a life sentence or a death sentence should be imposed. There was no suggestion that the Bible should be consulted as the legal authority contradicting the law of the court's instructions. There was no suggestion that the Bible should be consulted on factual issues as opposed to the evidence presented at the trial. To my knowledge, the reading of the scripture did not cause anyone to change their vote or to vote in a way that would have resulted in a death penalty being imposed. In my opinion, based upon the discussions during jury deliberations, our decision was based upon the evidence presented during the course of trial from the witness stand not on the reading of the scripture or the scripture's content. In my opinion, each member of the jury gave his or her individual guilt and punishment determinations based upon the law and evidence presented at trial. This is certainly true for me.

I am a conscientious person, who was faced with a life and death decision. I do not believe that the reading of the scripture violated the principles of justice. The reading of the scripture was not meant to violate any right of the defendant. The scripture reading was not meant to act in any way to bring prejudice against the defendant.

Moreover, in the overall scheme of about a two week trial and several hours of deliberations, the

above Bible reading was not related to the verdict returned to the court. Further affiant says nothing.

_____

Affiant,

SUBSCRIBED AND SWORN TO BEFORE ME this 6th day of July, 2005, to certify which witness my hand and official seal.

/s/ Wayne Murphy
Notary Public, State of Texas

Wayne Murphy
Notary's Printed Name

My Commission Expires: 10-22-06

Appendix G

No. 48,593-C

THE STATE OF TEXAS	X	IN THE 251st DISTRICT COURT
VS.	X	IN AND FOR
JIMMIE URBAN LUCERO	X	POTTER COUNTY, TEXAS

DEFENDANT'S RESPONSE TO STATE'S ANSWER AND BRIEF
ADDRESSING MOTION FOR NEW TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, JIMMIE URBAN LUCERO, Defendant in the above-styled and numbered cause, files this his Response to the State's Answer and Brief filed in the cause pertaining to Defendant's Motion for New Trial and Amended Motion For New Trial as well as his request for an evidentiary hearing and in support thereof would show the Court as follows:

I.

Standard of review

It is important to not lose sight of the fact that Defendant's Motion For New Trial as well as his

amended motion raises the issue of whether an outside influence was *improperly* brought to bear upon any juror. Rule 606(b) Texas Rules of Evidence. If the issue is *raised* and cannot be determined adequately from the existing record, our law, in fairness and in recognition of its search for the truth, usually provides the accused with the opportunity to establish his or her claim. In recognition of the seriousness with which the law regards the occurrence of juries being exposed to outside influences, the rules require a new trial in the event of such an occurrence. Rule 21.3 (f) & (g) Texas Rules of Appellate Procedure.

After careful review of the numerous juror affidavits, there can be no doubt that the chain of events as described in the original affidavit of W.W., attached to Defendant's original Motion For New Trial, did take place. A Christian Bible was brought into the jury room during jury deliberations on punishment. Prior to a final verdict on the special issues, the foreman read from this Bible certain, enumerated verse which was decidedly *not* inspirational but rather had to do with duty and responsibility for carrying out man's law (and this includes society's validation of the appropriateness of the death penalty). This reading took place at a time when the vote was *not* unanimous and the two dissenting jurors were identified for all concerned. Finally, following the reading, a *second* vote took place which was unanimous and which called for imposition of the death penalty.

It is for this trial court, and not the jurors, to determine whether this other evidence was adverse to Defendant Lucero

It is of no moment that the jurors did not believe that this Bible reading violated any principle of justice or any right of the Defendant or that it was utilized to bring prejudice against the Defendant. If this trial court determines that the Bible reading, which not one soul contends did not happen in the manner outlined in the original W.W. affidavit, constitutes evidence *not properly before the jury at trial*, then it cannot speculate on the probable effect of that evidence. *Alexander v. State,* 610 S.W.2d 750, 753 (Tex.Crim.App. 1980); *Rogers v. State*, 551 S.W.2d 369, 370 (Tex.Crim.App. 1977); *State v. Scott*, 819 S.W.2d 169, 170 (Tex.Crim.App.-Tyler, 1991, pet. ref'd.) The State's motion with accompanying affidavits asks this Court to do what authority specifically forbids - speculate on the probable effect of the Bible reading and base this decision on self-serving affidavits prepared in cookie-cutter fashion by the District Attorney's Office. The State concedes as much at page 19 of its brief.

II.

Why the evidentiary hearing is necessary

An evidentiary hearing is required in this case for several reasons.

1 - Opportunity to question jurors who refuse to talk with defense.

To begin, the State has now secured sworn affidavits from all twelve jurors who sat on Defendant's case, including four key jurors who previously had refused to talk with the defense. The State wishes to rely upon these affidavits to dispose of Defendant's claims *sans* hearing, including those jurors who have consciously chosen not to discuss this subject with the defense. As a result, the Defendant has been denied the opportunity to explore fully the circumstances of the Bible reading.

These self-serving affidavits raise more questions than they answer. Only through an evidentiary hearing where Defendant's counsel may put questions to the jurors in response to those matters raised in the affidavits can Defendant's adequately discharge his burden of making an adequate record for appellate review. And only through this evidentiary hearing can the this Court guarantee Defendant's constitutional right to due process.

2 - Foreman makes material, inconsistent statements to local TV station.

Moreover, it is now clear that the jury foreman has made statements which conflict with his sworn affidavit through his previous, extra-judicial comments made during an interview with a local television station on July 7, 2005. These interview statements are absolutely material to the analysis at

hand in that they strongly suggest that the foreman's decision to vote in favor of death came about as a direct result of having consulted Romans 13:1-6 *the night before punishment deliberations began* and that it was only after his personal epiphany that he decided to bring his personal Christian Bible into the jury room for a reading to the entire jury. The presence of the Bible in the jury room as well as his reading from the same was deliberate and planned and was not undertaken to emphasize the seriousness of the matter at hand as has been suggested in the foreman's affidavit. At present, the videotape and script which will corroborate the foreman's statements made to local television media are unavailable to the defense since representatives of the television station in question refuse to provide the subject videotape or script of the interview to defense counsel in the absence of a subpoena. Thus, there exists additional sources of evidence outside of the existing record necessary for determination of the issue raised within Defendant's motion for new trial and the only way to get to this source of evidence is to order an evidentiary hearing so that Defendant Lucero might avail himself of compulsory process in order to acquire this evidence.

3- This is truly a case of first impression.

Undersigned previously represented in his Memorandum of Law filed with the Court back on July 14, 2005 that there was no Texas case *directly on point* concerning Bible reading in the jury room during deliberations. Even in light of the two cases cited by the State which suggests otherwise,

undersigned sticks to his position - there really is no other case quite like this factual scenario. Fairness and the need to develop an adequate record for the Court of Criminal Appeals justifies an evidentiary hearing in the matter.

In *Martin v. State*, 400 S.W.2d 919 (Tex.Crim.App. 1966), the complaining witness in a rape case testified during examination before the jury to specific references in the Bible (Genesis 19:30-38) which she related directly to the defendant as "authority" for her sexual acts with him. These same verses were read by the jury from a different Bible than the one which the complaining witness referred during trial. The Bible references in question had been discussed and admitted into evidence during trial, thus forming part of the record of the case. This single fact clearly distinguishes *Martin* from the instant case.

In *Branch v. State*, 447 S.W.2d 932, 933 (Tex. Crim.App. 1969), the defendant claimed error because one of the jurors "quoted scripture from the Bible to the other jurors." The Court summarily disposed of the point of error by noting that the claim was not supported "by affidavit of one in position to know what transpired in the jury room during the deliberations of the jury." The issue left undecided in *Branch* thirty-six years ago is now decidedly pregnant given the affidavit of W.W. which established exactly what did transpire in the jury room during deliberations.

The time has come to address this serious issue head on and Defendant respectfully submits that only through an evidentiary hearing can the issue be resolved fully and fairly.

Appendix H

No. 48,593-C

THE STATE OF TEXAS	X	IN THE 251st DISTRICT COURT
VS.	X	IN AND FOR
JIMMIE URBAN LUCERO	X	POTTER COUNTY, TEXAS

DEFENDANT'S OBJECTIONS TO STATE'S JUROR AFFIDAVITS AND MOTION TO STRIKE SAME

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, JIMMIE URBAN LUCERO, Defendant herein, files this His Objections To State's Juror Affidavits and Motion To Strike Same and in support thereof would show the Court as follows:

I.

Defendant filed his Motion For New Trial on June 23, 2005. His Amended Motion For New Trial was filed on June 24, 2005. On June 30, 2005, the trial court corresponded with respective counsel and requested briefing on the issue of whether Defendant was entitled to an evidentiary hearing on his motion for new trial and what law, if any, existed on determination of what constituted an "outside influence" under the auspices of Rule 606(b) Texas

Rules of Evidence. (*see* Exhibit No. 1) In the letter, the trial court requested briefing on the issues to be completed no later than July 29, 2005 at which time the court would decide whether to set an evidentiary hearing on the motion.

Defendant filed his Memorandum of Law in response to the trial court's June 30th letter on July 14, 2005. Within the memorandum, Defendant again requested that the trial court grant and set an evidentiary hearing on the matters raised in the motions for new trial. The State filed its response to Defendant's motion for new trial on July 25, 2005. Attached to the State's response were affidavits signed by all twelve jurors who served on Defendant's trial. These affidavits all confirmed the fact that the jury foreman brought a Christian Bible into the jury room during deliberations at the punishment phase of Defendant's trial and read selected portions from that Bible to all other members of the jury. It is also undisputed that no part of the Bible was incorporated into the court's charge on punishment nor was the jury ever instructed by the trial court that it could consider any source of authority, including the Christian Bible, *other than the law as contained in the court's charge,* in answering the submitted special issues.

III.

On July 28, 2005, Defendant filed his Response to State's Answer and Brief with the trial court. Within this responsive pleading, Defendant again requested an evidentiary hearing on his

motions for new trial. In this memorandum of law, Defendant set forth proper standard of review when determining whether an outside influence was brought to bear on a juror. *See Rogers v. State*, 551 S.W.2d 369, (Tex.Crim.App. 1997); *State v. Scott,* 819 S.W.2d 169, 170 (Tex.Ct.App.-Tyler 1991, pet. ref'd.); *Molina v. State*, No. 07-00-0029-CR, (Amarillo Court of Appeals, January 21, 2003, not designated for publication). A bright line rule is in place: if it is established that there is no fact issue that the jury received other evidence and the evidence was adverse to the defendant, reversal is required. The courts will not speculate as to its *probable effect. Scott v. State,* 551 S.W.2d at 370.

The State argues competing theories; that is, that the introduction of the Christian Bible did not constitute an "outside influence" but even if it does, the reading of scripture during punishment deliberations amounts to nothing more than the reading of a dictionary or a secular book during deliberations. In support of both theories, the State has submitted the juror affidavits to show that the bible reading was harmless. Defendant pointed out in his response that all twelve affidavits attached to the State's answer addressed matters (bible reading and their interpretation of same) which occurred during their deliberations. Further, these affidavits also discussed why the biblical verses read by the foreman during jury deliberations did not cause "any juror's assent to or dissent from the verdict." As such, these affidavits run afoul of the prohibition against an attempt to impeach or sustain the validity of the jury's verdict. Rule 606(b).

Consideration of these juror affidavits is prohibited under either theory promoted by the State because it calls upon this court to speculate as to the probable effect of the scripture reading. The real task at hand is for this court to determine the context in which the bible reading occurred, the motivations of the jury foreman who set this chain of events into motion and whether the exact language contained in the particular version of biblical scripture was adverse to Defendant Lucero. Therefore, the contents of all twelve juror affidavits are not relevant to this court's duty at hand and, in fact, are inadmissible for that distinct reason.

IV.

As this court is aware, Defendant's Motion For New Trial and Amended Motion For New Trial are overruled as a matter of law on August 9, 2005. Defendant, as of the filing of this pleading, has received no word from the trial court whether it will set an evidentiary hearing on the motions. For this reason, Defendant herein lodges his formal objections to the juror affidavits attached to the State's Answer to Defendant's Motion For New Trial, moves to strike these affidavits from the record as absolutely prohibited by controlling law, requests that the court grant and set a hearing prior to or on August 9, 2005 in order to determine whether the bible reading was an "outside influence" and if so, whether it was adverse to Defendant Lucero and finally, to rule on Defendant's objections to the use

by the State of the juror affidavits and his request that same be stricken from the record.

Respectfully submitted,

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SBN 04300500

Appendix I

No. 48,593-C

THE STATE OF TEXAS	X	IN THE 251st DISTRICT COURT
VS.	X	IN AND FOR
JIMMIE URBAN LUCERO	X	POTTER COUNTY, TEXAS

DEFENDANT'S NOTICE OF APPEAL IN CRIMINAL CASE

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, JIMMIE URBANO LUCERO, Defendant in the above-styled and numbered cause, and submits this as notice of Defendant's intent to appeal from the judgment sentencing him to death in this case to the Court of Criminal Appeals in Austin, Texas.

Respectfully submitted,

WARREN L. CLARK
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/s/ Warren L. Clark
Attorney for Defendant
SBN 04300500

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice of Appeal was provided to the office of the Potter County District Attorney on this the 12th day of August, 2005.

/s/ Warren L. Clark
Warren L. Clark

Appendix J

No. 48,593-C

THE STATE OF TEXAS	X	IN THE 251st DISTRICT COURT
VS.	X	IN AND FOR
JIMMIE URBAN LUCERO	X	POTTER COUNTY, TEXAS

AMENDED MOTION FOR NEW TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, JIMMIE URBAN LUCERO, Defendant in the above-referenced and numbered cause, files this his Amended Motion for New Trial and in support thereof would show the Court as follows:

I.

After retiring to deliberate on the issue of punishment, the jury foreman conducted an initial straw vote on both of the statutorily mandated special issues which addressed the probability that Defendant would commit criminal acts of violence in the future so as to constitute a continuing threat to society (special issue number 1) and whether there existed sufficient mitigating circumstances to warrant that a sentence of life imprisonment rather

than a death sentence be imposed (special issue number 2). This initial vote revealed a majority of ten jurors who were prepared to vote "yes" to special issue number 1 and "no" to special issue number 2, thus necessitating the imposition of the death penalty. The remaining two jurors indicated their unwillingness to vote in such a way in which the death penalty would be imposed. At this juncture, the jury foreman produced his personal Bible and read to all members of the jury scripture from that Bible. This scripture addressed a Christian's duty to obey and consent to the laws of man. It also informed the listeners that those who opposed authority would experience condemnation.

The content of this scripture had the desired effect of coercing the two dissenting jurors to change their votes in order to insure a unanimous tally on both special issues. Thus, the receipt of the biblical scripture by the jury infringed on each individual juror's duty to base their verdict only on evidence received at trial. This receipt of other evidence was detrimental to Defendant's constitutional guarantee that the verdict at the punishment phase of the trial be truly unanimous, free from coercion and the product of the juror's individualized assessment of evidence lawfully admitted into during the punishment phase of the trial.

II.

Defendant requests an evidentiary hearing so that he may adduce facts not in the record relevant to the issue discussed under heading I.

III.

Application of Art. 37.071 Code of Criminal Procedure violates the 5th, 6th, 8th, and 14th Amendments to the U.S. Constitution and those principles underlying the United States Supreme Court decision in *Tennard v. Dretke*, 124 S.Ct. 2562 (2004) in that said law instructs the jury that it may not consider mitigating evidence which it does not find to be sufficiently connected to the crime to reduce moral blameworthiness. As such, said instructions unconsitutionally narrow the jury's discretion to factors concerning only moral blameworthiness.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that upon hearing hereon, the Court grant this motion in its entirety and order a whole new trial on the merits.

Respectfully submitted,

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/s/ Warren L. Clark
Attorney for Defendant
SBN 04300500

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion For New Trial was provided to the office of the Potter County D.A.'s Office on this the 24th day of June, 2005.

/s/ Warren L. Clark
Warren L. Clark

Appendix K

Constitutional Provisions Involved

U.S. Const. amend. VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend XIV, section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its

jurisdiction the equal protection of the laws.

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(2)

No. 07-1429

Supreme Court, U.S.
FILED
AUG 2 9 2008
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JIMMIE URBANO LUCERO,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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ATTORNEYS FOR RESPONDENT

QUESTIONS PRESENTED

The Sixth Amendment prohibits exposing juries to outside influences during deliberations. Such influences include bribery, information from third parties about the facts of the case, or other communications that have factual relevance to the issues before the jury. Courts must conduct a case-by-case examination to determine if an outside influence gives rise to a presumption of prejudice. Lucero's jury foreman began their hours of penalty-phase deliberation by reading, from his personal Bible, a quote instructing them to follow man's law. The trial court, in denying Lucero's motion for a new trial, found that he failed to show any harm. The state's highest court affirmed. Lucero now seeks certiorari review of that decision on a variety of grounds.

1. Is a Bible passage which duplicates the trial court's instructions considered an external influence on the jury that is presumed to be prejudicial?
2. If prejudice is presumed, was there sufficient evidence before the trial court to support its conclusion that the passage had no effect on the verdict?
3. Did the court below properly apply state law in denying a hearing on Lucero's motion for new trial?

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MISCELLANEOUS

Texas Rule of Evidence 606(b) 6,7,16,18,20

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner Jimmie Urbano Lucero (Lucero) was properly convicted and sentenced to die for the capital murder of his neighbors Maria Fabiana Robledo, Maria Manuela Robledo, and Pedro Robledo. In the instant petition for certiorari review, Lucero complains that his death sentence is void because the jurors read the Bible during punishment deliberations. As demonstrated below, the relevant passage they read resembles neither jury tampering by a third party, nor extraneous facts relevant to the case itself, and therefore is not an external influence that would support a presumption of prejudice. Further, any such presumption would be defeated by the ample evidence indicating there was no harm. Therefore, certiorari review should be denied.

STATEMENT OF THE CASE

I. Facts of the Crime

> On the morning of September 6, 2003 . . . 45-year-old [Lucero] entered his neighbor's property and murdered three members of the Robledo family with a shotgun. Pedro Robledo, his wife, Manuela Robledo, and their daughter Fabiana Robledo were murdered. [Lucero] also attempted to murder the Robledo's other two children, Socorro and Guadalupe Robledo, who both testified at trial. Socorro testified that he escaped on foot without injury, and Guadalupe testified that [Lucero] cornered her, Fabiana, and Fabiana's 18-month old son in a bedroom. [Lucero] shot Guadalupe in the arm and murdered Fabiana after

pulling her son from her arms.

Lucero v. State, 246 S.W.3d 86, 88 n.1 (Tex. Crim. App. 2008). On May 23, 2005, Lucero was convicted of capital murder.[1] CR 215. Pursuant to the jury's answers to two statutory special issues, the trial judge sentenced him to death on May 26, 2005. CR 214-216.[2]

II. Facts on Punishment

The State presented evidence that Lucero had assaulted and threatened various family members, girlfriends, other people, and pets; unlawfully carried a weapon; drove while intoxicated and burglarized a home. 17 RR 7-46, 138-39, 145-47, 163-65; 18 RR 86-89, 102-03, 125-34, 140-41, 145-46, 178-80; SX 178.[3] The State also presented testimony by the chief investigator for the Special Prosecution Unit, regarding the prevalence and violence of crimes within the prison system. 17 RR 80-135.

Lucero presented evidence that he was a favorite uncle to his siblings' children, and that he had been baptized at a local church. 17 RR 67-68; 18 RR 106-07; 19 RR 217-18; 20 RR 12. He was one of ten children abandoned by his father at a young age, and dropped out of school in the eleventh grade. 19 RR 28-29. Lucero's father was mentally ill and spent time in institutions. 20 RR 8-10. Lucero's mother and sisters testified that he

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[1] Tex. Penal Code Ann. § 19.03(a)(7) (West 2006).

[2] Tex. Code Crim. Proc. art. 37.071, §§ 2(b) & (e)(West 2006).

[3] "RR" stands for the Reporter's Record of proceedings during the trial, preceded by volume number and followed by page number(s); "SX" denotes the State's Exhibits admitted into evidence.

lived next door to his mother, checked on her frequently, took her grocery shopping and to the doctor's office, and took care of her home and yard for her. 19 RR 157-159, 224, 232; 20 RR 6-7. Additionally, Lucero presented testimony to the effect that the victims were rude to Lucero's elderly mother by cursing, having loud parties, and urinating in their backyard. 18 RR 59-60, 80-82; 19 RR 163-68; 20 RR 16-18, 34-37.

Dr. Steven Schneider, a forensic psychologist, testified that Lucero became tearful and would not discuss the crime with him. 19 RR 31. He also opined that Lucero was mildly to moderately neurologically and cognitively impaired, has an IQ of 73, was less able to consider the consequences of his actions, and had issues that could be addressed with medication. 19 RR 34, 36-37, 46. Lucero also presented testimony that he tried to commit suicide while awaiting trial. 19 RR 188-93.

III. Relevant Facts Regarding the Jury's Punishment Deliberations

The record establishes that the jury foreman read Romans 13:1-6, from the New International Version of the Bible, to the jury early on during punishment-phase deliberations. This took approximately two minutes, several hours before the verdict was rendered. CR 375; *see also* 275-278; 293-297; 300-328. Those verses provide:

> 1 Everyone must submit himself to the governing authorities, for there is no authority except that which God has established. The authorities that exist have been established by God.
>
> 2 Consequently, he who rebels against the authority is rebelling against what God has

> instituted, and those who do so will bring judgment on themselves.
>
> 3 For rulers hold no terror for those who do right, but for those who do wrong. Do you want to be free from fear of the one in authority? Then do what is right and he will commend you.
>
> 4 For he is God's servant to do you good. But if you do wrong, be afraid, for he does not bear the sword for nothing. He is God's servant, an agent of wrath to bring punishment on the wrongdoer.
>
> 5 Therefore, it is necessary to submit to the authorities, not only because of possible punishment but also because of conscience.
>
> 6 This is also why you pay taxes, for the authorities are God's servants, who give their full time to governing.

Lucero v. State, 246 S.W.3d at 89 n. 4.

After the trial, Lucero filed new trial motion raising a claim of jury misconduct. CR 220-223.[4] He attached to his motion an affidavit from a juror that provided:

> I served as a juror in the case styled *The State of Texas v. Jimmie Urban* [Urbano] *Lucero* in the 251st District Court in Potter County, Texas. During jury deliberations at

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[4] "CR" stands for the Clerk's Record of papers filed regarding this case, followed by page number(s).

> the punishment phase of the trial, I recall that the jury foreman suggested that we take a "straw vote" or a preliminary vote on the two special issues to see where we, as the jury were. The initial vote on both special issues showed 10 jurors were in favor of answering the questions in a way in which the death penalty would be imposed. The remaining two jurors were unwilling to answer those questions in a way in which the death penalty would be imposed. It was a[t] this point in time that the jury foreman took out a Bible which he had with him. He read some scripture from the Bible. This scripture had to do with a Christian's duty to obey, conform and consent to the will and laws of man. This reading of scripture occurred before the final votes were taken by the jury on the two special issues regarding the probability that the Defendant would commit criminal acts of violence in the future and the sufficiency of mitigating evidence which would justify a life sentence in place of the death penalty. Although there was not a unanimous vote by the jury as a whole on the two special issues before the reading of the scripture, the vote was unanimous on both special issues some time after the reading of scripture. The foreman of the jury then informed the bailiff and the Court that we had reached a unanimous verdict which called for the death penalty against Jimmie Lucero.

CR 220-223. Lucero further claimed that the trial court must hold a hearing on his new trial motions so that he

could develop the circumstances of the Bible reading. CR 237-43.

Texas Rule of Evidence 606(b) generally prohibits a juror from testifying about jury deliberations for the purpose of impeaching the jury's verdict, but it includes an exception that a juror may testify "whether any outside influence was improperly brought to bear upon any juror."[5] Relying primarily on civil cases, the State replied that the Bible reading was not an "outside influence" and that appellant was, therefore, improperly attempting to impeach the jury's verdict under Rule 606(b). CR 254.[6]

The juror whose affidavit was submitted by Lucero

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[5] Rule 606(b) provides: Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the jury's deliberations, or to the effect of anything on any juror's mind or emotions or mental processes, as influencing any juror's assent to or dissent from the verdict or indictment. Nor may a juror's affidavit or any statement by a juror concerning any matter about which the juror would be precluded from testifying be admitted in evidence for any of these purposes. However, a juror may testify: (1) whether any outside influence was improperly brought to bear upon any juror; or (2) to rebut a claim that the juror was not qualified to serve.

[6] Citing *Golden Eagle Archery Inc. v. Jackson*, 24 S.W.3d 362, 366-75 (Tex.2000)(rules contemplate that an "outside influence" originates from sources other than the jurors themselves); *Brandt v. Surber*, 194 S.W.3d 108, 134 (Tex.App.-Corpus Christi 2006, pet. denied) (a jury's discussion of newspaper articles is not an "outside influence"); *Easly v. State*, 163 S.W.3d 839, 842 (Tex.App.-Dallas 2005, no pet.) (a chart brought into jury room with calculations of time appellant would serve in prison after application of the parole laws is not an "outside influence"); *Perry v. Safeco Ins. Co.*, 821 S.W.2d 279, 281 (Tex.App.-Houston [1st Dist.] 1991, writ denied) (juror using dictionary to share a definition with other jurors is not an "outside influence").

gave a subsequent affidavit stating there was no connection between the Bible reading and the death-penalty votes. CR 293-297. All twelve jurors signed affidavits concerning the reading of the Bible during the punishment deliberations. CR 275-278; 293-297; 300-328. Eleven jurors agree that nothing was read suggesting that a murderer should be executed under Biblical law. The last juror does not recall what Scripture was read. CR 325. The two jurors who changed their votes after the preliminary vote state that the reading of the scripture and its content had no effect on their votes on the issues presented to the jury. CR 300-304, 306-308.

The trial court responded to Lucero's motion for new trial by requesting additional briefing, noting

> A motion for new trial supported only by inadmissible statements does not raise a matter upon which an appellant could be entitled to relief. . . Affidavit testimony to support a motion for new trial states reasonable grounds only if the matter discussed in the affidavit would be admissible in a subsequent hearing on the motion.

CR 231 (citing *Dunkins v. State*, 838 S.W.2d 898 (Tex.App.- Texarkana 1992, pet. ref'd.). After considering both parties' briefs, the trial court denied the hearing and motion for new trial and stated:

> While I recognize that "sometimes trial courts choose to wisely make a full record of factual matters in death penalty cases", I believe that such action is contrary to the public policy being promoted by Rule 606(b)

> of the Texas Rules of Evidence, in that it would subject the jurors to the rigors of direct and cross examination regarding their deliberations. Such public scrutiny of confidential deliberations would discourage open discussion among jurors and could potentially be threatening to the entire jury process.
>
> To conduct a hearing simply to make a record, without any expectation that the hearing would result in admissible evidence, does not protect jurors from the inconvenience and potential harassment that such a hearing would impose. Therefore, under the present circumstances, I do not believe that [Lucero] has raised an issue which would require an evidentiary hearing.

CR 350-51.

IV. Disposition in Court Below

Direct appeal to the Texas Court of Criminal Appeals is automatic.[7] After reviewing his seven points of error, the lower court affirmed the trial court's denial of a hearing and the jury's judgment and sentence of death. *Lucero v. State,* 246 S.W.3d at 88. Specifically, the lower court found that the record presented no reasonable grounds for relief. It further held that Lucero's request for an evidentiary hearing on his motion for new trial was appropriately denied, because the record showed that the scripture reading was brief and merely admonished jurors to follow "man's law," that the

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[7] Tex. Code Crim. Proc. art. 37.071, § 2(h).

quotation duplicated that which was in trial court's instructions, and juror affidavits clearly indicated that scripture had no effect on the verdict, which was rendered some hours later. *Id.* at 89. This petition follows.

REASONS FOR DENYING THE WRIT

I. The Jurors' Consultation of the Bible in the Jury Room Did Not Constitute an External Influence That Raises a Presumption of Prejudice Under the Sixth Amendment.

This Court has held that a defendant's Sixth Amendment right to an impartial jury is violated when the jury is exposed to outside influences during its deliberations. *Parker v. Gladden,* 385 U.S. 363, 364-65 (1966) (citing *Turner v. Louisiana,* 379 U.S. 466, 472-73 (1965)). Such outside influences trigger a rebuttable presumption of prejudice. *Remmer v. United States,* 347 U.S. 227, 229 (1954). Although this Court has not precisely defined "outside influence," it has offered some guidance. For example, information about the case from a newspaper account or a third person that was not introduced as evidence during trial is an external influence. *Tanner v. United States,* 483 U.S. 107, 117 (1987) (citing *Mattox v. United States,* 146 U.S. 140, 149-50 (1892); *Parker,* 385 U.S. at 365; and *Remmer,* 347 U.S. at 228-30). On the other hand, improper communications between jurors themselves, or irregularities within the jury room, are internal. *Id.* (citing *McDonald v. Pless,* 238 U.S. 264, 267 (1915); and *Hyde v. United States,* 225 U.S. 347, 384 (1912)); *see also id.* at 125 (categorizing juror intoxication or sleeping as internal).

Whether an influence is "external" or "internal" depends on the facts of each case, but at its core the distinction amounts to an examination of the "nature of

the allegation" of an improper influence on the jury. *Tanner*, 483 U.S. at 117; *see Oliver v. Quarterman*, --- F.3d ----, 2008 WL 3522425, (5th Cir. August 14, 2008); *Robinson v. Polk*, 438 F.3d 350, 363 (4th Cir. 2006) ("Under clearly established Supreme Court case law, an influence is not an internal one if it (1) is extraneous prejudicial information; *i.e.*, information that was not admitted into evidence but nevertheless bears on a fact at issue in the case, or (2) is an outside influence upon the partiality of the jury, such as 'private communication, contact, or tampering with a juror.'") (internal citations omitted). Judge King, in his dissent from the denial of en banc rehearing in *Robinson*, cogently synthesized these Supreme Court cases:

> The external influences recognized by the Court in those decisions are factually diverse, but they share a single, constitutionally significant characteristic: they are external to the evidence and law in the case, and carry the potential to bias the jury against the defendant. This legal principle unifies the bailiff's remarks disparaging the defendant in *Parker*, the relationship of confidence between the jury and key prosecution witnesses in *Turner*, and the effort to bribe a juror in *Remmer*.

Robinson v. Polk, 444 F.3d 225, 231 (4th Cir. 2006) (King, J., dissenting).

This Court's rationale in this area is logical and clear. For example, the Fifth Circuit recently found that a Bible passage from Numbers

> . . . does not generally inform a juror's moral understanding of the world. The jurors did

> not testify that they knew, as people of faith, that someone who hits another over the head with an "instrument of iron" or a "hand weapon of wood" so that the person dies is a murderer and should be put to death. Instead, several jurors testified that they read this passage in the Bible while they were in the jury room debating Oliver's fate. Thus, the jury's use of the Bible here amounts to a type of "private communication, contact, or tampering" that is outside the evidence and law, which is exactly what *Remmer* sought to circumscribe.

Oliver, 2008 WL 3522425 at *17 (citing *Remmer*, 347 U.S. at 229). However, the passage Lucero complains of is not analogous to the Biblical instruction that certain murders should be punished by death, as in *Oliver*, nor a third party's attempt to bribe a juror, as in *Remmer*. Nor is it similar to the undue influence resulting from contact with law-enforcement officials described in *Parker* and *Turner*. Indeed, *Remmer* and its progeny turn on the fact that the external influences in question had *evidentiary relevance* to the trial itself. *See Turner*, 379 U.S. at 472-73 ("the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel").

In this case, however, the Bible had no *evidentiary* relationship to the jury's punishment deliberations.[8] The

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[8] The only fact issues before the jury were "whether there is a probability that [Lucero] would commit criminal acts of violence that would constitute a continuing threat to society" and "whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and

Biblical passage from Romans in this case bears no relationship to the factual issues facing the jury. *See, e.g., Keeton v. State,* 724 S.W.2d 58 (Tex. Crim. App. 1987) (discussing factors to be considered by a jury in assessing future dangerousness). The passage involved confirms only the appropriateness of the jury following the court's instructions. That is not a factual issue at all; it duplicates the trial court's own charge authorizing the jury to make this moral judgment. *Lucero v. State,* 246 S.W.3d at 95.

This is the approach taken in sister circuits as well. For example, the Ninth Circuit has also assumed that a jury's reference to biblical verses during punishment deliberations is dissimilar to the types of misconduct addressed in *Remmer, Parker,* and *Turner. Fields v. Brown,* 503 F3d 755, 780-81(9th Cir. 2007). Instead, they merely reflect "notions of general currency that inform the moral judgment that capital-case jurors are called upon to make." *Id.* at 780. "The type of after-acquired information that potentially taints a jury verdict should be carefully distinguished from the general knowledge, opinions, feelings and bias that every juror carries into the jury room." *Id.* (quoting *McDowell v. Calderon,* 107 F.3d 1351, 1367 (9th Cir. 1997)) (quotation in *McDowell* omitted). Likewise, the Fourth Circuit has noted that a juror's consultation of the Bible during sentencing proceedings is not an external influence under *Remmer. Billings v. Polk,* 441 F.3d 238, 248 (4th Cir. 2006). The court expressed doubt that the juror's actions constituted a "private communication, contact, or tampering" within the meaning of *Remmer,* "which used

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background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed." Tex. Code Crim. Proc. art. 37.071, §§ 2(b)(1) & e(1).

those terms in the context of a case where a juror was offered a bribe and was subsequently investigated by an FBI agent during the trial." *Billings,* 441 F.3d at 248.

In the Sixth, Seventh, and Eighth Circuits, application of the *Remmer* presumption turns on the same case- and fact-specific discrimination between external and internal influences. *See, e.g., United States v. Gallardo,* 497 F.3d 727, 735-36 (7th Cir. 2007); *Garcia v. Andrews,* 488 F.3d. 370, 374-77 (6th Cir. 2007); *Garcia v. Bertsch,* 470 F.3d 748, 755-56 (8th Cir. 2006). Moreover, if there was error, it was trial error, not structural, and therefore is subject to harmless-error analysis under *Chapman.*[9]

Lucero contends there is a circuit split on the propriety of juries reading the Bible during their deliberations. Petition at 12-13. Procedurally speaking this case is not the best vehicle with which to address such a split, since the authorities to which Lucero refers are collateral attacks in the appeals circuit courts, not direct appeals in the states' highest courts. Lucero's strongest argument that there is a circuit split rests on the Eleventh Circuit opinion in *McNair v. Campbell,* finding a similar Biblical passage to be extraneous evidence creating a presumption of prejudice. Petition at 19; *McNair,* 416 F.3d 1291, 1309 (11th Cir. 2005). However, on facts much like these, habeas relief was properly denied because the State easily rebutted the presumption of prejudice. *Id.* As in Lucero's case, nothing judgmental or prejudicial was read. *Id.* As here, the passages and prayers merely had the "effect of encouraging the jurors to take their obligations seriously

[9] ". . . [B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California,* 386 U.S. 18, 24 (1967).

and to decide the question of guilt or innocence based only on the evidence." *Id.*

In addition to the innocuous nature of the Bible passages and the fact that they did not distract the jury from basing its verdict on the evidence presented, two other factors indicated in *McNair* also strongly favor the State in the instant case. The Bible in both cases was brought in by a juror without the imprimatur of the court. *Id.* Additionally, the State offered overwhelming and largely uncontested evidence of guilt and future dangerousness, while the defense offered a fairly weak mitigation case.[10] Even if a presumption of prejudice were appropriate, the State overcame it. These factors establish both that Lucero failed to make the showing necessary to merit an evidentiary hearing, and that the jury's exposure to the passage in Romans was harmless. *Id.*

Many of the cases Lucero refers to actually find Biblical reference during deliberation to be harmless and subject to case-by-case analysis. Petition at 22 (citing *People v. Williams*, 148 P.3d 47 (Cal. 2006) (Bible permissibly counseled deference to governmental authority and affirmed validity of sitting in judgment of fellow human beings); *State v. Kelly*, 502 S.E.2d 99 (S.C. 1998) (mistrial denied when jury had available a pro-death-penalty religious tract during deliberations; prejudice to be determined on case-by-case basis); *Jones v. Francis*, 312 S.E.2d 200 (Ga. 1984) (no prejudice found when trial court permitted jury to bring Bible into deliberations); *State v. Harrington*, 627 S.W.2d 345

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[10] In *McNair*, the Bible was read only to the guilt-innocence jury, so there was no mitigation evidence presented at that time. 416 F.3d at 1309 n.19.

(Tenn. 1981) (death sentence reversed for *Witherspoon*[11] error; in dicta the court comments that foreman buttressing his argument for the death penalty with the Bible during deliberations would have been reversible error)). Lucero also cites *United States v. Lara-Ramirez* to support his argument. Petition at 21 (citing 519 F.3d 76 (1st Cir.-Puerto Rico 2008)). *Lara-Ramirez* presented an entirely dissimilar fact pattern and a completely contrary holding. There, the circuit court was evaluating the propriety of a mistrial ruling, when the trial court did not know whether the Bible was even read. *Id.* at 88-89 (citing *Fields* 503 F.3d at 781-82; *Robinson v. Polk*, 438 F.3d at 366; *McNair*, 416 F.3d at 1308). In comparison, Lucero's trial court had adequate information about the nature and extent of Biblical reference during deliberations upon which to make its decision.

Lucero's "circuit split" is actually variation between fact patterns which does not justify a grant of certiorari in this case. Lucero fails to present authority supporting the proposition that the Bible is an outside influence of the sort that gives rise to a presumption of prejudice. Yet even if it did, the lower court was completely reasonable in finding that presumption rebutted by evidence that there was no prejudice to Lucero.

II. Both Subjective and Objective Evidence in the Record Supports the Lower Court's Finding that Error, if any, was Harmless.

Lucero next contends that jurors' subjective accounts of their deliberations cannot be considered in evaluating prejudice. Petition at 30. Lucero argues that the harm analysis was flawed because the lower court

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[11] *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

based its conclusion on the juror affidavits. *Id.* at 30-31. He also complains that a hearing should have been held to cross-examine the jurors about their affidavits. *Id.* However, the lower court's conclusion was supported by objective data independent of the subjective juror accounts, and its harm analysis was appropriate. The trial error about which Lucero complains was harmless beyond a reasonable doubt and, therefore, does not state a basis for reversal. *Chapman,* 386 U.S. at 23; *see also Delaware v. Van Arsdall,* 475 U.S. 673, 681 (1986) (holding that "an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt"). Additionally, Lucero relies on case law which is taken out of context. The lower court properly applied Texas Rule of Evidence 606(b), which did permit consideration of the jurors' affidavits if the influence was found to be an external one. Therefore, the lower court essentially performed a commonplace hypothetical analysis: the Bible was not an external influence, but if it was, it was harmless. *Lucero v. State,* 246 S.W.3d at 95-97.

The court below conducted two separate inquiries: whether the Bible reading was improper, and if so, harmful, *and* whether the trial court properly denied Lucero's motion for new trial and motion for an evidentiary hearing. The lower court noted that the objective record showed that this brief reading of Biblical scripture, "which was essentially an admonishment to follow man's law (and, therefore, duplicated what was already in the court's charge)," occurred near the beginning of jury deliberations. *Id.* at 95. As the trial court and the court below found, both the content of the quote and the length of time between the reading and the punishment verdict indicate that the scripture had no

effect on the verdict rendered some five hours later.[12] *Id.* "[A]ny constitutional error that [Lucero] may have preserved as a result of this Bible reading was harmless beyond a reasonable doubt." *Id.*

Lucero argues that the juror affidavits are inadmissible under "federal law" and therefore the lower court had no evidence regarding harm. Petition at 30-31, citing *Yates v. Evatt*, 500 U.S. 391, 404-05 (1991), *Smith v. Phillips*, 455 U.S. 209, 216 (1982), and *Rushen v. Spain*, 464 U.S. 114, 121 n.5 (1983). This is a misstatement. *Yates* instead addresses an unconstitutional jury instruction and says nothing about a state court's evidentiary rules regarding admissibility of evidence in this context. *Yates*, 500 U.S. at 404-05. *Smith* specifically encourages the consideration of jurors' subjective mental processes in jury-bias cases. *Smith*, 455 U.S. at 216-17. The note in *Rushen* permits testimony about whether prejudicial outside information was introduced into deliberations, which logically includes evidence about whether the information was prejudicial. *Rushen*, 464 U.S. at 121 n.5. This is essentially what *Tanner* says, too. Even *McNair* relied on juror testimony regarding their subjective reaction to Biblical passages. *McNair*, 416 F.3d at 1309.

Under Texas' scheme, neither Lucero's affidavits nor the State's are admissible *unless* the Bible is found to

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[12] Therefore, this is nothing like *People v. Harlan*, which Lucero cites out of context. 109 P.3d 616 (Colo. 2005); *see* Petition at 22. There, the Biblical quotes commanded the death penalty for murderers, and the Colorado trial court concluded that because of that passage, *not* Romans 13, "there was a reasonable possibility that use of the Bible in the jury room to demonstrate a requirement of the death penalty for the crime of murder would have influenced a typical juror to reject a life sentence for Harlan." 109 P.3d at 619-20. And *Harlan* was decided on state law grounds, *not* the Sixth Amendment.

be an external influence, and then testimony is permitted regarding whether the influence was "improper." Tex. R. Evid. 606(b). Ironically, if Lucero is correct and the Bible was an outside influence, the state statute *mandates* consideration of the jury's affidavits. Those affidavits conclusively demonstrate that the passage had no effect on the verdict. *Lucero*, 246 S.W.3d at 95.

Yet even discounting both sides' affidavits, the lower court's decision is supported by objective facts in the record. First, the content of the quotation speaks for itself. The portion read in deliberations did not introduce a competing set of laws—rather, it stressed that the jurors must obey the civil laws of government. *Id.* Since it is understandably difficult to be a juror in a death-penalty case, the foreman chose that scripture in order to comfort people and reassure them that they should follow the law and instructions of the trial court, and that the Bible encouraged them to do so.[13] *Id.* at 92. The Romans text does not mandate obedience to the prosecutors *per se*, nor did the jury discuss Christian history texts on what Saint Paul meant or intended regarding separation of powers. *See* Petition at 35-36. Nor did the jury foreman connect the dots between Romans and reaching any particular verdict. *Lucero*, 246 S.W.3d at 92.

Second, the record reflects deliberations spanning several hours. One juror said that "[t]he reading of the Bible and the comfort comment probably took less than 2 and 1/2 minutes out of several hours of deliberations

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[13] Texas Rule 606(b) does not prohibit considering juror testimony generally, only that which discusses the effect on the juror's mental processes influencing their verdict. Thus, it is perfectly acceptable to consider the foreman's description of what he read and his rationale for reading it, or another juror's account of how long the reading took and during what portion of deliberations it occurred.

discussing the charged law and the facts." *Id.* The record indicates that jury deliberations began at 12:20 pm and ended at 5:19 pm. The record also indicates that the scripture was read near the beginning of the deliberations, thus the jury deliberated for many hours after the scripture was read and before they rendered a final verdict. *Id.* at 95 n.9.

Thus, even were the lower court not permitted to consider the jurors' affidavits regarding their subjective impressions, it had adequate objective evidence in the record with which to conclude Lucero had failed to prove any harm. The trial court's decision was sound—the factually-irrelevant portion of Scripture read by the foreman could not have affected the verdict because it did not deal with punishment for murderers or indicate which way a juror should vote; at most, it advised the jurors to submit themselves to the authority of the court and its instructions— no more an "extrinsic influence" than the jury charge itself. *See* Petition at 16. Lucero would interpret this Biblical quote as mandating obedience to the prosecutors, not the government in general, and confuses court and legislature with the prosecutors as "the State," but no reasonable juror would, nor did Lucero's jurors do so.[14] Further, the Bible was brought in by a juror. Last, the State offered overwhelming guilt and punishment evidence, while the defense offered a fairly weak mitigation case.

Further, Lucero's motion for new trial and a hearing were denied on other grounds, not the merits of the Constitutional claim. Lucero was only entitled to an evidentiary hearing if his motion for new trial and

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[14] Carried to its logical conclusion, Lucero's argument would preclude instructing juries to obey the law, since the law is being enforced and championed by the law-enforcement officers and the prosecutors.

accompanying affidavits raised matters not determinable from the record, upon which he could be entitled to relief. *Lucero v. State,* 246 S.W.3d at 94 (citing *Wallace v. State,* 106 S.W.3d 103, 108 (Tex.Crim.App.2003)). Neither the trial court nor the lower court had to decide whether the Bible qualified as an external influence because Lucero "present[ed] no 'reasonable grounds' that this Bible reading affected the jury's verdict." *Id.* at 95. Under state law, the trial court's decision is reviewed for an abuse of discretion. *Lucero v. State,* 246 S.W.3d at 94 (citing *Martinez v. State,* 74 S.W.3d 19, 22 (Tex.Crim.App.2002)). Lucero fails to show that the trial court's decision was an abuse of discretion.

Lucero argues, inconsistently, that the lower court was wrong for considering "the jurors' subjective testimony of the Bible's effect on their votes" and at the same time was wrong for not holding an evidentiary hearing *in order to consider the jurors' testimony.* Petition at 30. If the lower court had held that the Bible was an outside influence, Lucero would still have failed to make a reasonable showing that the scripture reading affected the jury's decision, which would be required to summon the jurors for cross-examination. Finding the Bible to be an outside influence would merely confirm the admissibility of the jurors' affidavits under the Texas Rule 606(b) exception for testimony about outside influences, revealing the inconsistent nature of Lucero's position. Lucero puts the cart before the horse. The courts below merely evaluated whether Lucero had made the requisite showing that a hearing was likely to produce useful information in order to merit holding a hearing. Since the trial court concluded that the products of such a hearing would nonetheless be inadmissible, it found Lucero's showing deficient and denied further inquiry behind the verdict. CR 350-51.

CONCLUSION

Because the Texas Court of Criminal Appeals' analysis was correct, no special or important reason for granting certiorari exists. Accordingly, the State respectfully requests that this Court deny Lucero's petition.

Respectfully submitted,

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IN THE
Supreme Court of the United States

JIMMIE URBANO LUCERO,
PETITIONER,

v.

THE STATE OF TEXAS,
RESPONDENT.

On Petition for a Writ of Certiorari to the Texas Court of Criminal Appeals

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Brief in Opposition of the Respondent, the State of Texas ("State's Br."), underscores the need for this Court to review the Texas Court of Criminal Appeals' decision upholding the death sentence of Petitioner Jimmie Urbano Lucero. This Court should grant the petition for certiorari to resolve a widening split in authority on whether the Sixth Amendment prohibits the introduction of outside materials into capital jury deliberations.

I. Since The Filing Of This Petition, The Split Has Grown Wider Among The Federal Circuits Concerning Whether The Sixth Amendment Prohibits Jurors From Considering Outside Materials, Including A Christian Bible, In Jury Deliberations.

As set forth in Mr. Lucero's petition, there is a well-defined split amongst the federal appellate courts concerning whether the Sixth Amendment requires that a jury reach its decision only through consideration of the evidence presented at trial and the court's instructions, or whether jurors can consider additional materials expressing what are called "notions of general currency," "folk wisdom" or "common precepts." Indeed, this split is widening. Only last month, the Fifth Circuit explicitly "part[ed] company with the Fourth Circuit and join[ed] the majority of other courts to pass upon th[e] issue":

> Most circuits have ruled that when a Bible itself enters the jury room, the jury has been exposed to an external influence. Here, we face facts that are even more egregious than in those previous cases, as the jurors consulted a specific passage that provided guidance on the appropriate punishment for this particular method of murder. As such, we hold that the jury's consultation of the Bible passages in question during the sentencing phase of the trial amounted to an external influence on the jury's deliberations.

Oliver v. Quarterman, ___ F.3d ____, 2008 WL 3522425, *7-8 (5th Cir. Aug. 14, 2008).

Notwithstanding *Oliver* and the other cases cited in the Petition that stake out two starkly different roles on whether use of a Bible during jury deliberations is permitted under the Sixth Amendment, the State argues that there is no split in authority, and that any split does not merit this Court's attention. Both contentions are wrong.

A. The Circuit Split Is Irreconcilable.

The State attempts to harmonize the split of authority by arguing that the Sixth Amendment permits a jury to consider materials outside the record and not in evidence when those materials are merely "notions of general currency." State's Br. at 12 (citing *Fields v. Brown*, 503 F.3d 755, 780-81 (9th

Cir. 2007) (en banc), *cert. denied,* 128 S. Ct. 1875 (2008)); *see also Robinson v. Polk*, 438 F.3d 350, 363-66 & n.18 (4th Cir. 2006) (permitting materials containing "cultural precept[s]"). The State contends that courts find a Sixth Amendment violation only where the Bible verses consulted by the jury are not limited to such notions. State's Br. at 15.

The State is wrong. At least three federal courts of appeal have flatly rejected the jury's use of "notions of general currency" or any other material outside the record. Indeed, two of those courts found that consideration of a Bible verse violated the Sixth Amendment without inquiring into which verses were used. *United States v. Lama-Ramirez*, 519 F.3d 76, 86 (1st Cir. 2008); *McNair v. Campbell*, 416 F.3d 1291, 1308 (11th Cir. 2005).

Less than one month ago, the Fifth Circuit explicitly decided that the Sixth Amendment prohibits consideration of extra-record Bible verses regardless of the verse read. *Oliver*, 2008 WL 3522425 at *7. *Oliver* concluded that consideration of an extra-record Bible passage commanding that murderers be put to death violated the Sixth Amendment.

In *Oliver,* the Fifth Circuit rejected any distinction between extra-judicial materials constituting so-called acceptable "folk wisdom" or "cultural precepts," and other unacceptable materials. Although it recognized that some courts, such as the Fourth Circuit, seemed to have employed that distinction, the Fifth Circuit explicitly chose to

"part company with the Fourth Circuit" because the Supreme Court has taught the use of a simple, easily applied rule that a jury may not consider any law or evidence outside that presented in the case, period:

> The Supreme Court counsels us that a jury may not consult material that is outside the law and evidence in the case. The Bible passages in question here were not part of the law and evidence that the jury was to consider in its deliberations.

Id. at *7-8. Thus, the First, Fifth, and Eleventh Circuits have rejected the State's notion that certain Bible verses escape the Sixth Amendment's prohibition on outside materials.

The Fifth Circuit's rejection of a purported distinction between "notions of general currency" and other Bible verses is appropriate because there is no logical basis for the distinction. For instance, the State suggests that a Bible passage expresses a "notion of general currency" so long as it does not mention the crime before the jury by name. In the State's view, a verse commanding "an eye for an eye" is acceptable in a capital case, but a verse commanding that murderers be put to death is not. *See* State's Br. at 10-12; *see also Oliver*, 2008 WL 3522425, at *7. But why should this distinction matter to the Sixth Amendment? Neither passage was vetted through the trial process, and both express a divine command to repay injury with like injury. Upon considering the "eye" passage, a jury

would undoubtedly substitute "life" for "eye," arriving immediately at the concept the State agrees could not be directly introduced into deliberations.

The State's other attempts to distinguish permitted from forbidden verses simply suggest that verses are acceptable when they are "harmless" to the defendant. *See, e.g.,* State's Br. at 14 ("Many of the cases Lucero refers to actually find Biblical reference during deliberation to be harmless and subject to case-by-case analysis."). This conflates the inquiry whether there is error with whether that error is harmless.[1]

B. The Split of Authority Is Widening, Well-Developed, And Unlikely To Resolve Itself Without This Court's Review.

The State next suggests that although the federal appellate courts disagree whether the Sixth Amendment prohibits the jury's consideration of all outside materials, the split is not worthy of this Court's attention "since the authorities to which Lucero refers are collateral attacks in the appeals circuit courts, not direct appeals," apparently referring to the generous AEDPA standard of review. State's Br. at 13; *see also* 28 U.S.C. § 2254(d)(1). But while it is true that a court upholding a state court's legal conclusions under AEDPA could, theoretically, reach a different result on direct review, that does not necessarily make the "conflict" of authority any

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[1] Harmless error is addressed *infra*, Part II.

less "compelling" under this Court's rules. S. Ct. R. 10(a). Indeed, this Court has reviewed substantive legal questions in AEDPA-governed federal habeas cases several times in the past few years. *See, e.g., Uttecht v. Brown*, 127 S. Ct. 2218 (2007) (addressing *voir dire* of capital murder juries); *Brewer v. Quarterman*, 127 S. Ct. 1706 (2007) (addressing capital sentencing procedures); *Brown v. Payton*, 544 U.S. 133 (2005) (addressing capital jury instructions and prosecutorial misconduct); *Beard v. Banks*, 542 U.S. 406 (2004) (addressing retroactivity of capital sentencing rule); *Wiggins v. Smith*, 539 U.S. 510 (2003) (addressing ineffective assistance of counsel).

The AEDPA standard of review is of particularly little practical concern where, as here, the conflicting precedents are in fact unlikely to be abandoned by their courts. It is clear as a practical matter that the circuit split will not resolve itself, given that the conflicting legal positions have been carefully reasoned and are gaining adherents from additional courts considering the issue, even as recently as last month. The conflicting interpretations involved were not tentatively sketched but rather endorsed only after substantial consideration, including in some cases *en banc* review and dissenting opinions. *See, e.g., Fields v. Brown*, 503 F.3d 755, 776-81 (9th Cir. 2007) (en banc); *id.* at 783-87 (Gould, J., dissenting); *id.* at 792-97 (Berzon, J., dissenting); *Robinson v. Polk*, 438 F.3d 350, 368-73 (4th Cir. 2006) (King, J., dissenting in part). Furthermore, courts considering an extra-record Bible as a matter of first impression now expressly recognize a circuit split on the issue, and

ally themselves with some circuits while "part[ing] company" with the others. *Oliver v. Quarterman*, ___ F.3d ____, 2008 WL 3522425, *6-7.

This split in authority concerning the scope of the Sixth Amendment's prohibition of outside materials in jury deliberations will only continue to grow absent this Court's intervention. This in turn will lead to disparate results in different circuits on identical facts, undermining public confidence in convictions and, in capital cases, in the administration of the death penalty. It is unseemly for a capital defendant's fate to be decided by the place of his conviction. Mr. Lucero's case, on direct appeal from his conviction, offers the Court an opportunity to resolve the issue cleanly, without AEDPA deference. The Court should not pass up this opportunity to resolve the widening split.

II. The Objective Evidence Of The Jury's Deliberations Shows A Reasonable Likelihood That The Jury's Improper Consideration Of The Bible Caused It To Sentence Mr. Lucero To Death.

The State spends much of its Brief arguing that the jury's consideration of Romans 13:1-6 was harmless to Mr. Lucero beyond a reasonable doubt and could not have caused his death sentence. It claims this is so even though it agrees that, if the jury's consideration of the passage violated the Sixth Amendment, it must be *presumed* that the violation caused Mr. Lucero's death sentence. State's Br. at 9

(citing *Remmer v. United States*, 347 U.S. 227, 229 (1954)).

The State can reach this conclusion only by ignoring two critical points. First, the State ignores federal law requiring that only objective evidence be used to determine if there is a reasonable likelihood that the jury's consideration of the Bible affected its verdict. Second, in examining the objective evidence, the State ignores its heavy burden to prove that the presumptively prejudicial Bible passage is harmless beyond a reasonable doubt and ignores the reasonable interpretation of Roman 13:1-6 as calling for passive obedience to the state's call for punishment.

A. State Evidence Law Does Not Disturb This Court's Precedents Mandating Reversal Unless The Objective Evidence Of The Jury's Deliberations Prove Error Harmless Beyond A Reasonable Doubt.

The State agrees with Mr. Lucero that, under Texas law, juror affidavits are admissible to prove both a Sixth Amendment violation and the objective evidence of its effect on jury deliberations: how the evidence was used, how long, what happened before and after, and so forth. State's Br. at 16.[2] However,

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[2] The State consequently agrees that if this Court holds that Mr. Lucero has alleged a violation of the Sixth Amendment, Texas law will permit him to prove the jury's improper consideration of the Bible with juror testimony. *See* State's Br. at 18 ("[I]f Lucero is correct and the Bible was an outside influence, the state statute *mandates* consideration of the jury's

the State fails to understand that this Court has declared, as a matter of substantive federal law, that wherever the *objective evidence* of a federal constitutional violation and its circumstances fail to prove, beyond a reasonable doubt, that the violation was harmless, the defendant is entitled to reversal of his or her conviction. *Yates v. Evatt*, 500 U.S. 391, 404-05 (1991), *overturned on other grounds, Estelle v. McGuire*, 502 U.S. 62, 72 (1991); *Rushen v. Spain*, 464 U.S. 114, 121 n.5 (1983). In other words, federal law defines "harmless" in "harmless error" to mean "harmless in light of the objective evidence of the error." Subjective evidence "about the mental process by which the verdict was arrived" is irrelevant to this question, regardless of the general purposes for which juror testimony is admissible. *Rushen*, 464 U.S. at 121 n.5.

The State's Brief ignores this basic distinction, insisting that relevant objective evidence "logically include[s]" testimony about jurors' subjective mental processes. State's Br. at 17. This Court instead specifically has distinguished the two types of juror testimony, declaring the former relevant to the harmless error inquiry and the latter irrelevant.

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affidavits.") (emphasis in original). Even if the State did not agree, a ruling from this Court that the consideration of the Bible violated the Sixth Amendment would probably resolve any dispute concerning the admissibility of the juror affidavits in this case. *See Golden Eagle Archery, Inc. v. Jackson*, 24 S.W.3d 362, 368 (Tex. 2000) (suggesting that if "extraneous prejudicial information" constitutes an improper "outside influence," the Texas and federal rules governing juror testimony become indistinguishable).

Rushen, 464 U.S. at 121 n.5. Neither did this Court, by urging investigation of the impact of extra-record influences at an evidentiary hearing, suggest that the impact could be shown through evidence of "subjective mental processes." State's Br. at 17. (citing *Smith v. Phillips,* 455 U.S. 209, 216-17 (1982)). Courts can consider what the improper material was, how it was used, and what happened, but not the jurors' subjective, after-the-fact reports of whether they would have reached the same result even without the improper material.

The State misunderstands not only the federal law of harmless error, but also its relationship to state law: it consistently argues that state evidence law can change or trump Mr. Lucero's right to a federal remedy. *See, e.g.,* State's Br. at 17 (attempting to distinguish *Yates* as "say[ing] nothing about a state court's evidentiary rules"). The remedy for a federal constitutional violation is determined by federal law; otherwise, the federal right would be toothless. Harmless error is simply a particular case of this general principle: this Court has declared that unless objective evidence proves beyond a reasonable doubt that a constitutional error was harmless, the defendant is entitled to the remedy of reversal of his or her conviction. *Fry v. Pliler,* 127 S. Ct. 2321, 2325 (2007); *Chapman v. California,* 386 U.S. 18, 21 (1967). Texas can no more change that rule than it can repeal the Sixth Amendment itself. U.S Const. art. VI, cl. 2. The Texas Court of Criminal Appeals' reliance on subjective juror affidavits to ground its harmlessness finding was error.

B. The Objective Circumstances Of The Jury Deliberations Leave A Reasonable Doubt Whether The Jury's Consideration Of Romans 13:1-6 Caused It To Sentence Mr. Lucero to Death.

The State argues that Romans 13:1-6 "speaks for itself," and that "no reasonable juror would" conclude that the Biblical text called for submission to anything but the court or the law. State's Br. at 18-19. The State is wrong. The passage, composed well over a millennia before the modern jury, can more persuasively be interpreted to command obedience to the prosecutor. First, the passage does not urge obedience to laws of any kind, but instead to *a person*: "the one in authority," "God's servant." Pet. App. 99a-100a. The State's insistence that the passage refers to civil laws shoehorns the rule of law into a text where it does not appear.

Second, and more importantly, Romans 13:1-6 is inconsistent with the active role of the modern capital sentencing jury, suggesting that readers take it as a command to submit to the prosecutors rather than apply the jury instructions. While a capital sentencing jury must follow jury instructions, those instructions in fact invest it with broad sentencing discretion. The instructions essentially require the jury to exercise authority itself, indeed, a terrible and "truly awesome" authority, *Caldwell v. Mississippi*, 472 U.S. 320, 329-30 (1985), almost "playing God," *Sandoval v. Calderon*, 241 F.3d 765,

775 n.1 (9th Cir. 2000). No juror would intuitively recognize this power in Paul's command to *submit* to divine authority. Instead, the juror would think first of the only state authority in the courtroom commanding the jury to reach a particular result: the prosecuting attorney.

This command to obey the prosecutor is *presumed* to have caused the death sentence, *Remmer v. United States*, 347 U.S. 227, 229 (1954), and the State cannot point to facts sufficient to both overcome that presumption *and* prove the contrary beyond a reasonable doubt. The State claims that the Bible reading took only two and a half minutes. We do not know if that is true (Mr. Lucero has been denied an evidentiary hearing on the issue), but at any rate the passage's influence could have been far out of proportion to its length. If the outside material had introduced a single impermissible consideration (a single bit of inadmissible evidence concerning Mr. Lucero's history, for instance), brief consideration might suggest relative unimportance. But Romans 13:1-6 did not merely introduce an impermissible consideration in the jury's calculus. Rather, it urged the jury to disregard that calculus altogether, surrendering its discretion to the prosecutor. Two minutes' consideration of this divine command could reduce the remainder of deliberations to an empty formality. Indeed, in this case the jury foreman used the passage to "comfort" and "reassure" jurors about the jury's task, including two initial holdout jurors who subsequently changed their votes, suggesting that the jurors felt that God's command of submission to the prosecution relieved

them of personal responsibility to decide the case. State's Br. at 18; *see also* Pet. App. 47a-48a.

Finally, the overall balance of aggravating and mitigating evidence concerning Mr. Lucero leaves a reasonable doubt concerning whether, if the jury had not been read the Romans text, it would have found a sufficient mitigating circumstance to justify sentencing Mr. Lucero to life in prison. As the State notes, Mr. Lucero presented evidence that his crime occurred in part because of his terrible upbringing and mental impairments. Despite these troubles, Lucero had been able to play a positive role in his extended family. State's Br. at 2-3. It is presumed that the jury's improper consideration of the Bible passage caused it to find no sufficient mitigating circumstance where it otherwise would have, causing prejudice to Mr. Lucero and necessitating a retrial. It cannot be said that the passage was harmless beyond any reasonable doubt.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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